IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-457

EXXON PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 22, 1977

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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Petitioner, Exxon Pipeline Company (Exxon), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 29, 1977 in consolidated proceedings styled *Mobil Alaska Pipeline Co.* v. *United States and Interstate Commerce Commission*, Nos. 77-2392, 77-2412, 77-2421, and 77-2437.

OPINIONS BELOW

A divided panel of the United States Court of Appeals for the Fifth Circuit dismissed four petitions for review of an order of the Interstate Commerce Commission (the Commission) served June 28, 1977, in its Investigation and Suspension Docket No. 9164, *Trans Alaska Pipeline*

System (Rate Filings). A copy of the Fifth Circuit's decision entered July 29, 1977 is appended hereto as Appendix A. Included in Appendix A is the dissenting opinion of Judge Roney (pp. 41a-50a) and the order of the Commission (pp. 17a-40a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Court of Appeals was entered on July 29, 1977, and this petition has been filed within 90 days of said date.

QUESTIONS PRESENTED

Does the Interstate Commerce Commission have, as a "valid corollary" of its power under Section 15(7) of the Interstate Commerce Act to suspend rates filed by carriers, the power to prescribe interim rates without a full hearing?

Does the Interstate Commerce Commission have, as a valid corollary of its Section 15(7) suspension power, the power to impose refund conditions in respect of initial rates?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions directly involved are Section 15(1) and Section 15(7) of the Interstate Commerce Act (49 U.S.C. §§ 15(1), 15(7)). These provisions are set forth in full in Appendix B hereto.

This proceeding also presents issues arising under the Fifth Amendment to the Constitution of the United States which provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Exxon is one of the eight owners of undivided interests in the Trans Alaska Pipeline System (TAPS), a pipeline system stretching some 800 miles between Prudhoe Bay and Valdez, Alaska. After years of delay and the expenditure of more than $8.0 billion in construction costs, crude oil first entered the pipeline on June 20, 1977, and the first tanker was loaded at Valdez on August 1, 1977.

In anticipation of the operation of TAPS, Exxon (owner of a 20 percent interest) and the other owners filed tariff schedules with the Interstate Commerce Commission containing rates applicable to the transportation of crude oil through TAPS.[1] Exxon's filed initial rate of $6.27 per barrel was calculated in the manner in which pipeline rates have traditionally been calculated.[2]

The initial rates of the TAPS carriers were protested by the Commission's Bureau of Investigations and Enforcement, the Department of Justice, the State of Alaska, and the Arctic Slope Regional Corporation, each of whom, on one theory or another, contended that the rates were too high.

The cost of transporting crude oil from Prudhoe Bay to the lower forty-eight states has no effect on the landed

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[1] The other owners, their percentage ownership of TAPS, and the rates initially filed by them are: Amerada Hess Pipeline Corp., 1.5 percent ($6.44); Arco Pipe Line Company, 21.0 percent ($6.04); BP Pipelines Inc., 15.84 percent ($6.35); Mobil Alaska Pipeline Company, 5.0 percent ($6.31); Phillips Alaska Pipeline Corp., 1.66 percent ($6.22); Sohio Pipe Line Company, 33.34 percent ($6.16); and Union Alaska Pipeline Company, 1.66 percent ($6.09).

[2] The rate was based on Exxon's 20 percent share of the average TAPS costs for operating expenses, ad valorem taxes, book depreciation, and the ultimate removal of certain of the TAPS facilities and restoration of the right of way, and on its own interest and other expenses and income taxes for the years 1978 through 1981.

price of oil on the West or Gulf coasts of the lower-48 States, nor do the costs of transportation have any effect on the price ultimately paid by the consuming public in the lower-48 States. The landed price is established by market conditions and is related directly to the price charged by the OPEC nations. The transportation costs do, however, have a direct effect on the so-called wellhead price of North Slope oil (the selling price less transportation costs) upon which the royalty (12½ percent) to which the State of Alaska is entitled is calculated and upon which that State's severance tax is based.[3] Thus, the financial stakes at issue essentially involve the TAPS carriers and the coffers of the State of Alaska.

On June 27, 1977, oral argument was held before the full Commission. Under the Commission's procedures no opportunity was provided for any type of evidentiary hearing, the rules expressly providing that suspension proceedings "shall be informal," with no transcripts, subpoenas, or sworn testimony (49 C.F.R. § 1300.200). The next day, June 28, 1977, the Commission issued an order (App. A., pp. 17a-40a), which it modified in minor respects the following day, (1) suspending the carriers' proposed initial rates, (2) specifying a fixed "interim" rate for each of the TAPS carriers (ranging between $4.68 and $5.10 per barrel) which could be filed on one day's notice to be effective during the seven month period the carriers' proposed initial rates were suspended, (3) instituting an investigation of both the proposed initial

[3] The Arctic Slope Regional Corporation (ASRC) which also protested the initially proposed rates of the TAPS carriers is affected in some degree by the transportation costs in that the Inupiat Eskimos which ASRC represents have a claim in the amount of $500,000,000, constituting part of the compensation for extinguishment of aboriginal land claims, to be paid from a 2 percent royalty on the well head value of Alaskan crude oil production (43 U.S.C. §§ 1605, 1608), which is included in the amounts collected by the State of Alaska. Since the total amount to be collected by the Inupiats is fixed, variations in the wellhead price affect only the timing of their recovery of the total amount fixed by Congress.

rates and the prescribed interim rates, and (4) conditioning the effectiveness of both the proposed initial rates and the prescribed interim rates on the filing of refund provisions.

The Commission's Order placed Exxon in the untenable position of either filing the prescribed lower interim rate and exposing itself to substantial irreparable losses (which ultimately on July 30, 1977, it was compelled to do), or delaying the operation of its interest in the Trans Alaska Pipeline until the higher rate initially published became effective or until another rate was established after the full hearing required by law. Exxon therefore filed a petition for review on July 11, 1977, in the United States Court of Appeals for the Fifth Circuit, and on July 12, 1977, filed a motion for expedited consideration or, in the alternative, for a stay pending review. In its motion, Exxon contended, that (1) it was likely to prevail on the merits because the Commission's order (a) was tantamount to a prescription of rates which can only be done after "full hearing," (b) imposed refund conditions which can only be done in the case of "increased rates," and (c) was arbitrary and capricious and an abuse of discretion; and (2) a stay of the Commission's Order pending review was appropriate in the circumstances because those paying the rates filed by the TAPS carriers were fully protected by the reparations provisions of the Interstate Commerce Act in the event the Commission ultimately determined those rates to be excessive, while Exxon and the other TAPS carriers could never recover revenues lost in the event the Commission-prescribed interim rates were ultimately determined to be too low.[4]

[4] As this Court stated in Arizona Grocery Co. v. Atchison, T. & S.F.R. Co., 284 U.S. 370, 387-388 (1932), "If that body sets too low a rate the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order

Exxon's petition for review and motion for interim relief were consolidated with those of other TAPS carriers.[5] Oral argument was held before Chief Judge Brown, Judge Godbold, and Judge Roney on July 19, 1977.

On July 29, 1977, the Court of Appeals issued its decision granting the motion of the United States and Interstate Commerce Commission to dismiss the petitions for review (App. A, 1a-16a). Judge Roney dissented (App. A, 41a-50a).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit decision raises very fundamental questions of whether an administrative agency is to be limited to the powers which the Congress has entrusted to it, or whether, when confronted with a matter which is vitally important to the public and in which the stakes are enormous, it is to be permitted to implement its own notions of what the public interest requires and to act without regard to express limitations upon its powers.

The Interstate Commerce Act provides in clear terms that the Commission may prescribe rates only after it has held a "full hearing." In this case, the Commission has assumed for itself the power to prescribe rates without a full hearing and the Fifth Circuit has condoned that action.

The Interstate Commerce Act also provides in clear terms that the Commission may impose refund conditions only where carriers propose *increased* rates. In

upon the ground that it was unreasonably low." See also Hope Natural Gas Co. v. Federal Power Commission, 196 F.2d 803 (4th Cir. 1952).

[5] Mobil Alaska Pipeline Company, BP Pipelines, Inc., and Arco Pipe Line Company also filed petitions for review. Three other TAPS carriers, Sohio Pipe Line Company, Amerada Hess Pipeline Corporation, and Union Alaska Pipeline Company, intervened as petitioners.

this case, the Commission has assumed for itself the power to impose refund conditions where the carriers have proposed *initial* rates and the Fifth Circuit has condoned that action as well.

The theory of the Fifth Circuit is that the assumption of a power to prescribe interim rates without hearing and the assumption of a power to impose refund conditions with respect to rates which are not increased rates are "valid corollaries" of the Commission's power under Section 15(7) of the Act to suspend rates. If the power to prescribe interim rates did not inhere in the suspension power, the Commission, according to the Fifth Circuit, "would be forced to allow initial rates to go into effect, even if facially outrageous, . . . or to watch a possibly vital public service close down for want of a rate schedule" (App. A, p. 14a).[6]

In support of its theory that the power to prescribe interim rates without hearing and the power to impose refund conditions in respect of initial rates are corollaries of the Commission's suspension power, the Fifth Circuit relies principally upon this Court's decision in *United States* v. *Chesapeake & Ohio Ry. Co.*, 426 U.S. 500 (1976). Moreover, as corollaries of the Commission's power to suspend, the exercise of those assumed powers is, according to the Fifth Circuit, nonreviewable by reason of this Court's decisions in *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP I)*,

[6] A tacit premise underlying both the action of the Commission and the decision of the Fifth Circuit seems to be that the pipeline carriers are wholly irresponsible and may file exorbitant rates. Such premise is certainly not justified in this case, and, as a general matter, is contrary to pronouncements of this Court that "good faith is to be presumed on the part of the managers of a business." See West Ohio Gas Co. v. Public Utilities Com., 294 U.S. 63, 72 (1935); Interstate Commerce Com. v. Chicago G.W. R. Co., 209 U.S. 108, 119-120 (1908).

412 U.S. 669 (1973) and *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).[7]

The Court should grant this petition for a writ of certiorari for the reasons that the decision of the Fifth Circuit is (1) squarely at odds with the plain language of the Interstate Commerce Act, (2) in conflict with decisions of this Court to the effect both that a power to prescribe rates is never to be implied and that, even where a power to prescribe rates has been expressly given, the elements of a full and fair hearing must be rigidly adhered to, (3) a perversion of this Court's holding in *United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500 (1976), and (4) in direct conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Moss* v. *C.A.B.*, 430 F.2d 891 (D.C. Cir. 1970).

I.

THE HOLDING THAT THE COMMISSION MAY IMPOSE REFUND CONDITIONS IN RESPECT OF INCREASED RATES IS CLEARLY ERRONEOUS.

Illustrative of the sense of urgency and willingness to disregard the statutory limitations upon its powers is the action of the Commission in imposing refund conditions with respect to both the carriers' proposed rates and to the interim rates prescribed by the Commission.

With little explanation and no justification, the Commission ordered that (App. A, p. 30a):

[7] Even if a power to prescribe interim rates and to impose refund conditions did inhere in the Commission's suspension power, the Fifth Circuit is incorrect in its conclusion that the *exercise* of such power is nonreviewable. This Court's holdings in *Arrow* and *SCRAP* indicate only that a *refusal to exercise* the suspension power is unreviewable, as the Congress plainly entrusted to the sole discretion of the Commission the power to withhold implementation of rate increases. See also Port of New York Authority v. United States, 451 F.2d 783 (2d Cir. 1971); Oscar Mayer & Co. v. United States, 268 F.Supp. 977 (D.Wis. 1967).

> "[A]s a condition to filing such interim rates, we will require that the carriers keep account of the amounts collected . . . and that they agree to refund any portion of such amounts that may ultimately be established as excessive."

In addition, the Commission ordered that as a condition for collecting the suspended initial rates, if the Commission has not completed its investigation before the end of the suspension period, the carriers must file a similar refund provision applicable to the original proposed rates.

The Fifth Circuit, while expressing doubts concerning the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates (App. A, p. 16a), nonetheless upheld the Commission's action with respect to both the proposed rates and the interim rates as a corollary of its suspension power.

The sole source of the Commission's power to provide for refunds is set forth in Section 15(7) of the Interstate Commerce Act. That power clearly applies only to *increased* rate filings and not to initial rates:

> ". . . but in case of a *proposed increased rate* or *charge* for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such *increase*, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such *increased rates* or *charges* as by its decision shall be found not justified" (emphasis added). 49 U.S.C. § 15(7).

The statutory language could hardly be more specific in referring to *increased rates*, to the exclusion of initial rates. In the absence of statutory authority to impose a refund provision upon the carriers as a condition to filing

initial rates, the Commission has no power to impose such a provision without the consent of the carriers. *See Admiral-Merchants Motor Freight, Inc.* v. *United States*, 321 F.Supp. 353 (D.Colo. 1971), *aff'd* 404 U.S. 802 (1971).[8]

The framers of the Act obviously recognized the hazards that would confront a carrier initiating a new service if its entire initial rate were put at risk by virtue of a refund provision. The mere possibility of having to refund the entire amount collected in connection with a new venture would have a severe chilling effect on such initiatives. By contrast, when a carrier merely increases an existing rate only the increased amount is subject to refund, a much more reasonable and limited risk for a carrier. The framers of the Act clearly intended to confine the exercise of the refund power to increased rates and were thus careful in the wording they chose.

II.

THE FIFTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THIS COURT RECOGNIZING THE ESSENTIALITY OF HEARINGS IN THE RATE-MAKING PROCESS.

The Fifth Circuit decision would permit the Commission to replace the statutory scheme of rate-making with a procedure of its own invention. That decision must, however, give way to the clear dictates of the Interstate Commerce Act.

Section 15(7) provides the Commission with several options when carriers file schedules of rates: (1) it may

[8] Recognizing that the Commission has no authority to impose a refund condition on initial rate filings, Exxon, nevertheless, in a good faith gesture, indicated to the Commission that it would voluntarily adopt a suitable refund provision *if, and only if*, the Commission allowed its initial tariff to become effective as filed.

allow the rates to go into effect without investigation or suspension; (2) it may investigate the rates; (3) if it investigates, it may suspend the rates for a period of seven months; or (4) if it investigates, but does not suspend, it may, in the case of increased rates, impose a refund condition. These are actions which the Commission can take summarily.

Section 15(7), however, makes it very clear that only "after full hearing" may the Commission "make such order with reference thereto as would be proper in a proceeding initiated after it had become effective"; that is, the Commission can prescribe a different rate, as it can do under Section 15(1) in the case of rates already in effect, only after it has held a "full hearing." In this case, the Commission has assumed for itself that an additional power to act summarily—a power to prescribe a level of rates for application during the seven month suspension period which the Commission perceives to be appropriate, without a hearing and without any evidentiary support.

The decision of the Fifth Circuit, upholding that assumption of power, is in conflict with decisions of this Court indicating that a power to prescribe rates will not be implied, but must be expressly granted, and that, even where such power is expressly granted, the elements of a full and fair hearing must, as a matter of statutory construction and Constitutional due process, be rigidly observed.

A. The Power To Prescribe Rates Is Not To Be Implied; It Must Expressly Be Granted.

The Commission's assumption of power in this case is very much like the assumption of power condemned by this Court in *Interstate Commerce Commission* v. *Cincinnati, N.O. & T.P. R. Co.*, 167 U.S. 479 (1897). That case

involved the validity of a Commission order prescribing rates for the future at a time (prior to 1906) when the Interstate Commerce Act did not expressly authorize the Commission to prescribe rates. In that case, it was argued, much in line with the Fifth Circuit's rationale here, that the Commission inherently had such power (1) because "Congress attempted by the legislation in question to afford an adequate and complete remedy . . . for abuses perpetrated by the transportation lines of the country" and that unless the power to award reparations were construed to include a power to prescribe rates for the future "it is plain that those abuses, when they still exist, can continue to flourish without any real restraint" (42 Sup.Ct. at 246), and (2) the "reparations required is the whole of that conduct which the word 'reparation' principally means, and thus short of doing that [prescribing rates for the future] the proceeding shall go on, and then the Commission shall have power to require all that the carrier is bound by law and justice to do" (*id.* at 248). In effect, the parties attempting to sustain the Commission's action were arguing that the Commission *should* have power to prescribe rates. It was also argued, as the Commission argues here, that the Commission's action was not "fixing rates," but rather that it was merely indicating what the Commission would regard as a joint and reasonable rate (*id.* at 248-249). The Court rejected such arguments:

> "The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to

> the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication" (167 U.S. at 494-495).
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> "We have, therefore, these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transfered such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the Commission this power of fixing rates, is the clear language of § 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first,

publication, and second, the filing of the tariff with the Commission. The grant to the Commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the Commission" (167 U.S. at 505-506).

More recently, in a somewhat different context, this Court has indicated that the delegation of powers to administrative agencies, exercise of which substantially affects the rights of those regulated, is not to be implied. In *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316 (1961), the Court was concerned with a C.A.B. order which, if upheld, meant that the Board could circumvent the notice and hearing requirements applicable by statute to changes in a certificate of public convenience and necessity by retaining jurisdiction of the issuance of such certificates for the purpose of entertaining petitions for reconsideration. The Court rejected that effort, saying:

> ". . . the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do" (*id.* at 320).
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> * * * *
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> ". . . the Board must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers in the enabling act" (*id.* at 334).

Similarly, the power to prescribe interim rates for application during the suspension period may not be implied. Where Congress has found the need to delegate to the Commission a power to prescribe rates, it has done so in unmistakable terms. Thus, following this Court's decision in the *Cincinnati, N.O. & T.P.* case that the

Commission had no power to prescribe rates, Congress, in the Hepburn Act of 1906, vested in the Commission the express power to prescribe maximum rates "after full hearing"; and, in 1920, when the Congress, in the light of emerging predatory competition among modes of transportation, perceived a need to enable the Commission to prescribe minimum rates, it expressly authorized the Commission to do so, again "after full hearing."

The Congress has not yet conferred upon the Commission a power to prescribe, without hearing, interim rates to apply during the period that it has suspended carrier-initiated rates.[9] Under the principles announced by this Court, such a power cannot be created by implication.

B. Where A Power To Prescribe Rates Does Exist, This Court Has Required Strict Adherence To "Full Hearing" Requirements.

This Court has on a numerous occasions addressed itself to the need for a hearing in the rate-making context. It has consistently required, either as a matter of statutory construction or Constitutional due process, that all of the elements of a full and fair hearing be observed.

Thus, in *Interstate Commerce Commission* v. *Louisville & N.R. Co.*, 227 U.S. 88, 91, 92 (1912), involving a Commission order declaring existing rates unlawful and prescribing rates for the future, this Court stated that:

> "The statute (gives) the right of full hearing . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its

[9] Any suggestion that Congress' inaction in granting such authority creates a gap in the regulatory scheme is unfounded in view of the fact that shippers required to pay carrier-initiated rates which are ultimately found to be too high are entitled to reparations (49 U.S.C. § 16).

> rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding."

As Chief Justice Hughes observed, writing for the Court in *Atchison, T. & S.F. Ry. Co.* v. *United States*, 284 U.S. 248, 262 (1932):

> "The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority . . . operates in a field limited by constitutional rights and legislative requirements. Its duty under [section] . . . 15(1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates . . . has not been changed. . . . In the discharge of its duty, a fair hearing is a fundamental requirement."

The power to prescribe rates has been characterized by this Court as an "extraordinary power" and a hearing prior to the exercise of that power as an "inexorable safeguard." *Morgan* v. *United States*, 304 U.S. 1, 15 (1938). An administrative agency, "as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed." *Morgan* v. *United States*, 298 U.S. 468, 479 (1936). And where Congress has required that a full hearing precede a rate prescription, "the granting of that hearing is a prerequisite to the making of a valid order" (*id.* at 473). In *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n.*, 301 U.S. 292 (1937), the Court condemned an order of a state regulatory agency directing the payment of rate refunds for years as to which no hearing was held in respect of the utility's rate base, saying (301 U.S. at 304):

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their

> informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 . . .) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U.S. 468, . . . Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88 . . . The right to such a hearing is one of 'the rudiments of fair play'. . . ."

In *Railroad Commission of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388 (1938), involving a prescription of rates, this Court stated that

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement" (302 U.S. at 393).

In the instant case, the Fifth Circuit acknowledged that the suspension proceeding was not a "full hearing" concerning the interim rates—the "Commission heard oral argument . . . without making any formal evidentiary record" (App. A, p. 5a). The Fifth Circuit would thus enable the Commission to ignore the statutory scheme of rate making and to adopt a procedure of its own invention, all in violation of the plain language of the Interstate Commerce Act. The decision of the Fifth Circuit which would undermine well-established procedural safeguards, through the expedient of characterizing a prescription of rates as a "corollary" of the Commission's suspension power, cannot be allowed to stand.

C. The Consequences Of The Fifth Circuit's Decision Are Untenable.

This case dramatically illustrates why the Congress and this Court have consistently required agencies to adhere to the requirement that a full and fair hearing precede a prescription of rates.

The TAPS carriers contended before the Fifth Circuit that the Commission's action was an abuse of discretion and that the prescribed interim rates were so low as to be confiscatory. Exxon, for example, pointed out that the Commission calculated the $5.10 rate prescribed for Exxon on the basis of a volume throughput which could not possibly be achieved during the period that that rate will be in effect, thus grossly overstating the revenues and the resulting return for Exxon during that period. Exxon also pointed out that the Commission, by failing to take into account the impact of both inflation and income taxes, seriously understated the amounts which the carriers must collect each year in order to satisfy their restoration and removal obligations in the year 2002.[10]

The Fifth Circuit cavalierly rejected these contentions:

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[10] There is presently pending before the Commission Exxon's Petition for Reconsideration and Supplement thereto demonstrating that even if the principal legal assumptions underlying the Commission's order were to be accepted, serious factual errors in that order require correction. Exxon contends that if the Commission were to adjust only for a realistic estimate of throughput volumes to be achieved during the suspension period, applying all of the other standards employed by the Commission (*i.e.* 10% return on valuation, inclusion of interest expense as an element of return, and no allowance for inflation or taxes in calculating removal costs), the minimum interim rate for Exxon during this period should be about $9.00 per barrel instead of the $5.10 prescribed. Collection of its filed rate of $6.27 will only serve to reduce petitioner's losses resulting from less-than-anticipated throughout.

> "Assuming that we can review the Commission order through these constitutional entry points the record before us gives no basis upon which we can act" (App. A, p. 16a).

This statement is indeed startling. The Fifth Circuit holds in effect that the Commission may as a corollary of its suspension power prescribe rates without hearing and without any evidentiary record to support that rate prescription, yet the courts are unable to entertain contentions that the rates prescribed are confiscatory because there is no administrative record by which they can assess those contentions.

This sort of circuitous logic should itself condemn the Fifth Circuit's decision; and, when viewed in the light of this Court's decisions, discussed above, there is no conceivable basis upon which it can be upheld.

III.

THE FIFTH CIRCUIT'S RELIANCE UPON *UNITED STATES* v. *CHESAPEAKE & OHIO RY. CO.* IS WHOLLY UNWARRANTED.

The majority below purports to be guided by this Court's decision in *United States* v. *Chesapeake & Ohio Ry. Co.*, 426 U.S. 500 (1976). That case does not support the Fifth Circuit's decision. In the *Chesapeake & Ohio* case, this Court held only that the Commission may, as a condition of not suspending and subsequently investigating the lawfulness of a general increase in rates, require the carriers to devote a portion of the increased revenues to the particular purpose which the carriers contended justified the increase, that is, to make up for delayed capital improvements and deferred maintenance. Clearly, *Chesapeake & Ohio* did not involve the question of whether the Commission could prescribe rates

without full hearing; instead, that case involved the question of whether the Commission could require the railroads to devote the additional revenues to a particular purpose—a question of alleged intrusion upon management prerogatives for which there was no express statutory authority. This Court, while expressly disclaiming that it had held or implied "that the Commission may involve itself in the financial management of the carriers" (426 U.S. at 514), held only that where the carriers represented to the Commission that a proposed general rate increase could be justified *only* on the basis of particular needs, the Commission, whose task it is to determine whether proposed rates are just and reasonable, could condition its refusal to exercise its power of unconditional suspension by requiring that the railroads use the additional revenues to satisfy those particular needs—"the Commission simply held the railroads to their representation that the increase was justified by needs in these two areas" (426 U.S. at 515).

Thus, in *Chesapeake & Ohio*, the conditions imposed by the Commission were ancillary to the suspension process, and merely intended to insure the validity of the decision not to suspend the rates. Although such conditions were not expressly authorized by the Act, neither were they expressly forbidden. In this case, however, the Fifth Circuit allowed use of the suspension power as a pretext for evading an express statutory requirement that ratemaking be preceded by a "full hearing." The Fifth Circuit's decision is an unwarranted and irrational extension of the limited holding of the *Chesapeake & Ohio* decision.[11]

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[11] The Fifth Circuit also, while citing *Chesapeake & Ohio* as its sole authority for condoning the Commission's unlawful Order, ignores the fact that in that case this Court considered the conditions placed upon the proposed tariff to be judicially reviewable (426 U.S. at 515). *See* dissent of Judge Roney, App. A, p. 44a.

IV.

THE FIFTH CIRCUIT DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT IN *MOSS* v. *C.A.B.*

The Fifth Circuit's decision is in direct conflict with *Moss* v. *C.A.B.*, 430 F.2d 891 (D.C. Cir. 1970). In *Moss*, the CAB called for an oral argument on the advisability of exercising its power to investigate and suspend new rates filed by the airlines before they went into effect (430 F.2d at 894). Similarly, in the instant case, the Commission held oral argument with respect to the advisability of exercising its power to investigate and suspend the initial rates filed by Exxon and the other carriers. As in *Moss*, there was no indication by the Commission prior to oral argument that it might prescribe its own rate schedule without the investigation and full hearing mandated by Congress. In *Moss*, the Board suspended the rates proposed by the carriers, outlined its own fare formula, and announced its decision to "permit tariff filings implementing" that formula to be filed without suspension, thus assuring almost immediate effectiveness (430 F.2d at 894-895). Similarly, in the instant case, just one day after oral argument, the Commission issued its order suspending the carriers' rates and authorizing the carriers to file on one day's notice interim rates not exceeding specific prescribed amounts.

In *Moss*, the CAB contended that the rates it outlined were only *suggested* rates. The court disagreed. Even though the CAB "never in so many words 'ordered' the carriers to file the rates" (*id.* at 898), the court found that the CAB's action constituted a prescription of rates:

> "As a practical matter, the Board's order amounted to a prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula were great,

> if not actually irresistible . . . It would seem that upon any realistic interpretation, this order involved the legislative determination of rates by an agency for the future . . ." (*id.* at 897).

The same conclusion is inescapable in the instant case. Indeed, the Commission's action is even more coercive than that of the CAB in *Moss;* the Commission did not even attempt to disguise in its order that the Commission would declare any rates exceeding the prescribed rates unlawful. The only alternative to filing the prescribed interim rates open to the carriers was to file no rates during the suspension period, thus delaying the operation of the Trans Alaska Pipeline for up to seven months. Given their enormous capital investments and the public interest in the receipt of Alaskan oil, the carriers simply could not afford to allow the pipeline to remain unused for that period. The choice between accepting the Commission's rates and not accepting those rates was actually no choice at all.

The Fifth Circuit distinguishes the *Moss* case by stating (App. A, p. 14a) that it involved permanent, rather than temporary rates and that the CAB action "went beyond the strongest action it could have taken under its suspension power, i.e., suspending the proposed increases for 180 days." Thus, according to the Fifth Circuit, the Interstate Commerce Commission's action in this case is "more restrained, or measured, than its right to unconditionally suspend the original tariff for a period of seven months." *Ibid.*

The Fifth Circuit also attempts to distinguish *Moss* by stating that "the practical effect of the CAB's actions would have been to immunize the suggested permanent rate structure from judicial review," while here "the ICC has not sought to shield it final decision from judicial review" (App. A, p. 14a). While it is true that the Commission's decision after it has held a full hearing will

be subject to judicial review, the fact remains that the interim rate prescription, which will cost the TAPS carriers millions of dollars which can never be recovered, will, if the Fifth Circuit's decision is allowed to stand, never be subject to any meaningful judicial review.

The distinction between interim and permanent rates is unwarranted.[12] There is no language in the Interstate Commerce Act which distinguishes interim from final action for purposes of determining whether there has been a prescription of rates. Moreover, the case law clearly supports the proposition that an agency may not avoid the procedural requirements of a statute simply by stating that interim rates, not final rates, are involved. For instance, in *American Smelting and Refining Co.* v. *FPC,* 494 F.2d 925 (D.C. Cir.), *cert. denied,* 419 U.S. 882 (1974), the FPC was required to follow the procedural requirement of full hearing, even though the action in question was an interim order issued under emergency circumstances. As the court noted:

> "The [Federal Power] Commission's power to promulgate an interim curtailment plan is not born of emergency. Rather, it is based upon the statutory authorization to perform 'any and all acts' necessary or appropriate for the implementation of the Natural

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[12] The rate prescription is interim only in the sense that it is to apply during the statutory seven month period during which the TAPS carriers proposed initial rates have been suspended. At the end of that period, if the investigation has not been concluded, the filed rates "shall go into effect" (49 U.S.C. § 15(7)). The prescribed rates, however, are the only rates which will ever be applicable during that seven-month period, absent action by this Court.

In the TAPS rate proceeding, the Commission's Bureau of Investigations and Enforcement has recently petitioned the Commission for an order extending the suspension period indefinitely, until the Commission has completed its investigation. While that petition must run afoul of this Court's decision in Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (1963), it nevertheless indicates the extraordinary efforts to re-write the Interstate Commerce Act which have marked every stage of this case.

> Gas Act . . . The 'core section' underlying the orders now before us is Section 5(a) which empowers the Commission, on its own motion, after hearing, to correct discriminatory practices by natural gas companies. *Like any order issued pursuant to section 5 (a), an interim order can only issue after full hearing and must include a statement of facts which are supported by substantial evidence in the record*" (*id.* at 933; emphasis added).

The Court went on to note that even in an emergency, the Commission may not ignore "the usual procedural requirements for valid administrative action" (*id.*).

The suggestion that the Commission's action here was "more restrained, or measured" than that of the CAB in *Moss* is, like the distinction between interim and permanent rates, contrary to common sense. Such action cannot possibly be justified on the grounds that the losses resulting from the prescription of interim rates are likely to be insubstantial. There can be no doubt that each day the pipeline companies are forced to receive lower rates than are fair and reasonable (and this can only be determined after appropriate evidentiary hearings), such companies suffer irreparable economic loss. As Judge Roney noted in his dissent, "[t]he argument that this is not ratemaking because it is only an interim and not a permanent rate loses force in numbers. The pipeline companies claim the difference between what they should get and what they will get under the interim rate could amount to $340,000,000. This sum is undoubtedly greater than the amount at stake in many permanent rates subject to ICC approval" (App. A, p. 42a). The Fifth Circuit's observation that the Commission's action here was "more restrained" than that of the CAB in *Moss* is equally specious. In *Moss*, the agency merely attempted through its suspension power to reduce a proposed increase in rates, which would have left the carriers with the existing rate plus some increment. Here, because

initial rates are involved, what the Commission has done is compel the carriers either to take the Commission prescribed rate or have no rate at all for seven months. The suggestion that such action is "more restrained" defies all logic.

Plainly, what the Commission has done here, and what the Fifth Circuit condones, is to prescribe rates without a full hearing, contrary to the plain language of the Interstate Commerce Act.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review on the merits the issues raised.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 77-2392, 77-2412, 77-2421 and 77-2437

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION, et al.,
Respondents,

and

SOHIO PIPE LINE COMPANY, AMERADA HESS PIPELINE
CORPORATION, UNION ALASKA PIPELINE COMPANY,
Intervening Petitioners,

STATE OF ALASKA AND
ARCTIC SLOPE REGIONAL CORPORATION,
Intervening Respondents.

BP PIPELINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION,
Respondents.

EXXON PIPELINE COMPANY,
Petitioner,

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION,
Respondents,

and

UNION ALASKA PIPELINE COMPANY,
Intervening Petitioner.

ARCO PIPE LINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, et al.,
Respondents,

STATE OF ALASKA,
Intervening Respondent.

July 29, 1977

On Petitions to Review an Order of the Interstate Commerce Commission.

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

Four petitions seeking injunctive relief and review of a June 28, 1977 Order of the Interstate Commerce Commission are before us, together with the United States' motion to dismiss.[1] For reasons discussed below, we grant the government's motion.

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[1] No. 77-2392, Petition of Mobil Alaska Pipeline Company (Mobil) to Annul, Set Aside and Enjoin Enforcement of an Order of the Interstate Commerce Commission and Applications and Motions for Temporary Restraining Order and Interlocutory Injunction. The respondents in this case were the United States, the Interstate Commerce Commission (ICC or Commission) and the latter's individual Commissioners. The State of Alaska moved to appear as a party. The Arctic Slope Regional Corporation moved to intervene. Both opposed Mobil's petition. Sohio Pipe Line Company moved to appear as a party in support of Mobil's petition, as did Amerada Hess Pipeline Corporation. Union Alaska Pipeline Company moved to appear as a party.

No. 77-2412, Petition to Enjoin, Set Aside, Suspend and Review Order of the Interstate Commerce Commission and Motion to Stay, Restrain and Suspend Order of the Interstate Commerce Commission filed by BP Pipelines, Inc. (BP), naming the United States and the ICC as respondents.

No. 77-2437, Petition for Review and Application for Interlocutory Injunction filed by Arco Pipe Line Company (Arco). The United States, the ICC and its individual Commissioners were named as respondents. Alaska also sought leave to appear as a party in opposition to Arco's petition.

No. 77-2421, Petition for Review and Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, filed by Exxon Pipeline Company (Exxon), naming the ICC and the United States as respondents. Union Alaska Pipeline Company moved to appear as a party.

The United States moved for consolidation and to dismiss. The motion for consolidation was granted from the Bench during oral argument on July 19, 1977. The court hereby grants all motions to intervene.

Background Of The Case

This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS)[2] which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[3]

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[2] In 1968 massive reservoirs of oil were discovered at Prudhoe Bay. Plans to construct the pipeline were announced in 1970. From its beginning the pipeline has been grist for judicial mills. *See, e.g., Wilderness Society* v. *Morton,* 156 U.S.App.D.C. 121, 479 F.2d 842 (1975) (en banc); *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *rev'g* 161 U.S.App.D.C. 446, 495 F.2d 1026 (1974). Indeed, it literally took an act of Congress to prevent further environmental litigation. Trans-Alaska Pipeline Authorization Act, 43 U.S.C.A. § 1652(d). Construction was thus delayed until 1974 and took three years

Oil began to enter the pipeline on June 20, 1977. An explosion and fire at pump station No. 8 on July 8, 1977, resulted in a temporary shutdown. The parties have informed the court that the first oil is expected to reach Valdez around July 26, 1977.

[3] Each of the following companies owns an undivided interest in TAPS:

[Footnote continued on page 8a]

Between May 27, 1977 and June 15, 1977, seven TAPS owners filed the tariffs [4] which are at issue here,[5] having effective dates ranging from June 20 to July 1, 1977. Protests were filed by the Department of Justice, the State of Alaska,[6] the Arctic Slope Regional Corporation,[7]

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[3] [Continued]

Company	Percentage Ownership
Mobil Alaska Pipeline Co.	5.00%
Sohio Pipe Line Co.	33.34%
Arco Pipe Line Co.	21.00%
Exxon Pipeline Co.	20.00%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

These companies are subject to ICC regulation by virtue of the Interstate Commerce Act, 49 U.S.C.A. § 1(1)(b), which covers common carriers engaged in the transportation of oil by pipeline.

[4] Tariffs must be filed with the ICC pursuant to 49 U.S.C.A. § 6(1).

[5] Because Phillips, the eighth owner, filed its tariff on June 20, 1977 with an effective date of July 20, the time for filing protests had not expired by June 28, the date of the ICC's order. Phillips' tariff was thus not covered by the Order and is not before this Court.

[6] Alaska owns a one-eighth royalty interest in the oil from the Prudhoe Bay fields. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, *i.e.*, the wellhead value. Alaska contends that the wellhead value is generally determined by the market price *less* the transportation costs. Therefore, as the TAPS carrier rates increase, the value of Alaska's interest decreases.

[7] Prior to the enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. §§ 1601-1627, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. The Arctic Slope Regional Corporation is one of 12 corporations

and the ICC's Bureau of Investigation and Enforcement. The Commission heard oral argument on June 27, 1977 [8] without making any formal evidentiary record.[8a]

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established pursuant to ANCSA to conduct Native Alaskan business for profit. 43 U.S.C.A. § 1606. As compensation for the extinguishment of all aboriginal land claims, ANCSA granted Alaskan Natives fee title to approximately 400 million acres of land. 43 U.S.C.A. §§ 1611, 1613. All future revenues derived from that land will be the property of the Native people. 43 U.S.C.A. § 1606. ANSCA further provided for cash compensation of $962,500,000 to be paid over a period of years, a portion of which is to be derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C.A. §§ 1605, 1608. Thus, on their theory, the Native Alaskans' revenue is inversely related to the rise in TAPS tariffs.

[8] Recognizing the importance of the controversy, the ICC, in an extraordinary move, bypassed its usual procedural channels and took the suspension proceeding for its own direct consideration. While Commission regulations consider a protest and petition to suspend "as addressed to the discretion of the Commission" 49 C.F.R. § 1100.42 (1976), suspension protests and petitions are in practice routinely referred to the Board of Suspension. See 49 C.F.R. § 1100.200 (1976); Mobil Memorandum In Support of Application for Interlocutory and Temporary Restraining Order at 7; Reply of Interstate Commerce Commission in Opposition To Application For Interlocutory Injunction and Temporary Restraining Order at 4. The Commission heard arguments for one full day before issuing its suspension order.

Although a transcript of that hearing was made, the papers on file with the Court contain only excerpts from that proceeding. *E.g.*, Appendix A to Justice Department's Memorandum in Support of Motion to Dismiss; Appendix C to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order. Also, the tariff filings themselves, with any supporting submissions, were not filed with the Court. On file with the Court, however, were several exhibits such as "Reply of Exxon Pipeline Company to Protests" (Appendices of Exxon Pipeline Company for Expedited Consideration or in the Alternative Stay Pending Review) and statements by C. R. Thompson, Controller-Treasurer of Mobil Alaska Pipeline Co. (Appendix D to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order).

[8a] The briefs of the parties contained references to the information which the ICC apparently had before it during the suspension

The ICC's June 28 Order [9] instituted an investigation into the lawfulness of the tariffs pursuant to 49 U.S.C.A. §§ 15(1) [10] and 15(7).[11] The rates filed were suspended

proceeding. Such information included: (i) written representations in the form of protests from the State of Alaska, the Arctic Slope Regional Corporation, the United States Department of Justice, and the Bureau of Investigations and Enforcement of the ICC (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 2); (ii) verified statements offered by the TAPS Carriers in support of their rate calculations (Memorandum in Support of Exxon Pipeline Company's Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review at 46) [hereinafter Exxon Memorandum]; (iii) statement of Dr. Michael J. Ileo (submitted with Alaska's protest) which discusses the unreasonableness of carriers' rate calculations (Exxon Memorandum at 46); (iv) sworn testimony of Raymond B. Gary, a Managing Director of Morgan Stanley & Company, and Dr. Ezra Solomon, Dean Witter Professor of Finance at the Graduate School of Business of Stanford University, filed in Ex Parte No. 308, *Valuation of Common Carrier Pipelines* (Exxon Memorandum at 38); (v) letters sent from Mobil Alaska Company to ICC (obtained under the Freedom of Information Act, 5 U.S.C.A. § 552) which deal with such topics as TAPS start-up, depreciation, dismantling and restoration, anticipated salvage, and estimated annual operating expenses (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunctions and Temporary Restraining Order at 25-6); (vi) calculation of the rates of return on valuation for 90 regulated pipelines for the years 1970-72, made by George M. Stafford, former ICC Chairman (Exxon Memorandum at 40-1); and (vii) a variety of carrier-provided data concerning the normal traffic volume for the beginning years of TAPS, costs, depreciation charges, and investment calculations (ICC June 28 Order at 5-7 and Appendices to Order).

[9] The Order is set forth as an Appendix to this opinion.

[10] 49 U.S.C.A. § 15(1) reads in pertinent part as follows:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation

> of persons or property, as defined in section 1 of this title . . . is or will be unjust or unreasonable . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged . . . and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be. . . ."

[11] 49 U.S.C.A. § 15(7):

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further

for seven months without prejudice to the filing of interim rates during the suspension period. The Commission additionally authorized the filing, upon not less than one day's notice, of interim rates which were not to exceed certain levels, subject, however, to the condition that the carriers keep account and that (i) the interim tariffs contain a refund provision to the effect that if the new rates exceed those subsequently authorized or prescribed by the ICC, the carriers will refund the excess with interest; and (ii) the carriers file a similar refund provision applicable to the original proposed rates. The Order thus had the following effect on the carriers' proposed rates per barrel:

	As Filed by TAPS Owners	Authorized By Order [12]	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	Not Yet Acted Upon	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

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order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. . . ."

[12] According to the ICC, these rates reflect a 10% rate of return on tentative valuation. See pp. 4-8 of the ICC Order, and Appendices 2-5 thereto.

The carriers estimate that the Order will result in an irretrievable $340 million loss over the seven-month suspension period.

The suspension left the pipeline company without tariffs on file, and they are forbidden by § 6(7) of the Act to engage or participate in the transportation of oil unless they file new tariffs. The carriers thus had two alternatives open to them. They could file new tariffs within the ICC guidelines or they could shut down the TAPS system for the seven-month suspension period. Unhappy with either choice, the pipeline companies filed their petitions and motions and the United States moved to dismiss.[13] This Court heard oral argument on July 19, 1977.

The major issues raised by the parties are (i) whether we have jurisdiction to review the ICC order; (ii) whether the Commission has the authority under 49 U.S.C.A. § 15(7) to suspend the first and only ("initial") rate of a carrier; (iii) whether as part of a purported suspension order the ICC may prescribe or suggest optional maximum interim rates; (iv) whether the ICC's order authorizing the filing of maximum interim rates without a full hearing amounted to a prescription of rates within the meaning of 49 U.S.C.A. § 15(1); (v) whether the Commission acted outside its statutory authority in ordering the refund provisions in the tariffs; (vi) whether the Commission's action was arbitrary, capricious or constituted an abuse of discretion; (vii) whether the maximum interim rates authorized were confiscatory in violation of the Fifth Amendment.

1. Reviewability and the authority of the Commission

The government has moved to dismiss the petitions for review on the ground that this court has no jurisdiction

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[13] *See* note 1, supra.

to review suspension orders of the ICC issued pursuant to 49 U.S.C.A. § 15(7). True, courts do not have jurisdiction to review ICC suspension orders. Congress has committed the decision to suspend or not to suspend proposed rates exclusively to the discretion of the Commission. *U.S.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963); K. Davis, ADMINISTRATIVE LAW TREATISE 966 (1970 Supp.). As a panel of this circuit noted:

> The Interstate Commerce Commission . . . is vested with power to suspend, at its discretion, for a period of seven months, rates filed with it pending hearing and decision on their lawfulness. 49 U.S.C. § 15(7). The existence of this power in the ICC, it has been held, evinces the deliberate decision of Congress to extinguish judicial power to grant any injunction which interferes with the Commission's discretionary decision to suspend rates filed with it at anytime before the Commission finally determines the lawfulness of the rates.

Texas v. *Seatrain International*, 518 F.2d 175 at 178 (CA5, 1975). But the rule of unreviewability presupposes an affirmative answer to a preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7). A suit to enjoin a suspension order may be entertained if the complaint shows that the agency lacked the basic statutory authority to issue such an order. *Great Western Packers Express, Inc.* v. *U.S.*, 246 F.Supp. 151, 154 (D.Colo., 1965) (three-judge court); *Long Island Railroad Co.* v. *U.S.*, 193 F. Supp. 795, 800 (E.D.N.Y., 1961) (three-judge court).

Section 15(7) gives the ICC the power to suspend "any schedule stating a new individual or joint rate, fare, or

charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge" for a period not to exceed seven months, and to order an investigation and full hearings on those new charges. The above language has no plain meaning. The term "new" can refer to both changed and initial rates or only changed rates. The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.

Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. § 15(7) giving the ICC authority to suspend new rates, proposed by motor carriers, 49 U.S.C.A. § 316(g), by water carriers, 49 U.S.C.A. § 907(g)(i), and by freight forwarders, 49 U.S.C.A. § 1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. § 1482(g), which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have

done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers.

The conclusion that initial rates are covered by § 15(7) is consistent with the legislative policy underlying that section. Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

2. The suggested interim rates

The petitioners challenge the action of the Commission with respect to suggested interim rates. They point out that § 15(7) contains no provisions for establishing interim rates and that, in any event, rates can only be prescribed after full hearings. See 49 U.S.C.A. § 15(1). The Commission's position is that it has not actually fixed a rate but, in a situation of urgent national interest and as an incident of its power to suspend, it has given advance indication of the maximum rates with respect to which—if the carriers elect to file them—the Commission will not exercise its power to suspend.

The Commission Order refers to "interim rates," but baldly describing the issue as the power of the Commission to set interim rates is misleading. As we have held, the Commission had the power to unconditionally suspend the proposed tariffs, leaving the carriers without any tariffs but free to file new tariffs if they wished, which would be subject to new exercise of the Commission's power to suspend. The ICC chose not to exercise to its full limits the drastic but available power of unconditional suspension and instead announced that if petitioners would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally filed.

The petitioners maintain that the § 15(7) power to suspend is an all or nothing instrument. We think not. The Commission may elect to exercise its power less than fully, or putting it another way, may partially waive the suspension power. We are guided by the Supreme Court's decision in *U.S.* v. *Chesapeake & Ohio Railroad Co.*, 426 U.S. 500, 96 S.Ct. 2318, 49 L.Ed.2d 14 (1976) (*"Chessie"*). In *Chessie* the ICC suspended a carrier-proposed tariff increase but at the same time authorized the railroads to refile, incorporating conditions which would assure that the additional revenue would be expended on capital improvements and deferred maintenance. The Supreme Court upheld the refiling provision as directly related to the ICC's suspension power. The Court noted that the ICC could simply suspend the originally proposed rates for the full statutory seven-month period but that instead "it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented." 426 U.S. at 514, 96 S.Ct. at 2325, 49 L.Ed.2d at 23. *Chessie* establishes the right of the ICC to choose to exercise its suspension power to less than its outer limits in order to meet the needs of a particular situation. The ICC's authorization to file interim rates was the type of "more measured course" or partial waiver which the Supreme Court approved in *Chessie*.

Moss v. *CAB*, 430 F.2d 891 (C.A.D.C., 1970), relied on by the petitioners, is not to the contrary. In *Moss* the Court of Appeals for the District of Columbia held that the Civil Aeronautics Board (CAB) could not, after ex parte meetings with the air carriers, "suggest" a com-

prehensive rate formula that it would not suspend or investigate. *Moss* involved what for all intents and purposes was the establishment of permanent rates. By attempting to establish a permanent rate structure through its suspension power the CAB took actions which went beyond the strongest action it could have taken under its suspension power, i.e., suspending the proposed increases for 180 days. 49 U.S.C.A. § 1482(g). In essence what the CAB attempted to do in *Moss* was to waive a right it did not have. In contrast, the ICC's suggestion of interim rate ceilings in the present case is an action which is more restrained, or measured, than its right to unconditionally suspend the original tariff for a period of seven months. If in seven months the ICC has not completed its investigation, the carriers will be free to levy their originally filed charges subject to a refund order.

Also, in *Moss* the practical effect of the CAB's actions would have been to immunize the suggested permanent rate structure from judicial review.[14] In the present case the ICC has not sought to shield its final decision from judicial review. Instead the Commission has commenced hearings on the original rates proposed by the petitioners, and any eventual final order stemming from those hearings is subject to judicial scrutiny.

In a case involving initial rates, if the ICC could not couple its suspension order with a statement of maximum allowable interim ceilings, the Commission would be forced to allow initial rates to go into effect, even if facially outrageous, subject only to lengthy investigation and hearing procedures, or to watch a possibly vital public service close down for want of a rate schedule.

[14] Judge Leventhal in his concurring opinion in *Continental Airlines, Inc.* v. *CAB*, 173 U.S.App.D.C. 1, 522 F.2d 107 at 131 (1975) (en banc), emphasized the evasion of judicial review as the key to *Moss*.

We doubt the Congress would have intended that the Commission face that Hobson's choice.

The use of interim rates as a condition to a suspension order is not unprecedented. In I & S Docket No. 8645, Orders (May 27, 1971, and June 29, 1971) the Commission ordered that increased lighterage charges proposed by the Penn Central Railroad be suspended but allowed the company to file interim r s containing additional charges not to exceed 50% of those initially proposed. The ICC's orders also required that Penn Central maintain an account from which refunds could be made to the extent that the proposed tariffs could not be justified to the Commission. In *Port of New York Authority* v. *U.S.*, 451 F.2d 783, 785-88 (CA2, 1971), the Second Circuit held that the Order was unreviewable and that federal courts lacked subject matter jurisdiction over an action challenging the Order.

We conclude that the ICC as corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend. Therefore, this aspect of its Order is not reviewable by this court.

3. The refund provisions

As a condition precedent to the interim rates which the Commission stated it would accept, the Commission required the carriers to establish refund provisions for use in the event that either the interim rates or the originally filed tariffs[15] or both should be found to be excessive.

With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates

[15] As we noted previously, if the Commission does not complete its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect.

themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. *See Port of New York Authority* v. *U.S., supra.* We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie*, where the condition upheld by the Supreme Court was permanent.[16]

4. Arbitrariness and confiscation

The petitioners assert that the Commission action was an abuse of discretion and that the interim rate ceilings are so grossly insufficient that they are confiscatory in violation of the Fifth Amendment. Restating, we understand these contentions to be that even if the Commission is authorized by § 15(7) to act with respect to the subject matter, its exercise of power departed from constitutional standards. Assuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act.

All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED. The motion of the United States to dismiss the petitions for review is GRANTED.

[Judge Roney's dissent is set forth in pp. 41a-50a of this Appendix].

[16] Under § 15(7) the Commission may require carriers to keep records and make refunds after the seven-month period has expired. This expressly conferred authority is not what we rely upon—it relates to "a proposed increased rate or charge."

ORDER *

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 28th day of June, 1977.

INVESTIGATION AND SUSPENSION
DOCKET NO. 9164

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

No. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

Initial rate tariffs have been filed by eight pipeline companies, proposing to operate as common carriers of crude petroleum over the Trans Alaska Pipeline System.

Protests and petitions for suspension of the tariffs have been filed by the United States Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation and our Bureau of Investigations and Enforcement. These pleadings seek to invoke our power under section 15(7) of the Interstate Commerce Act (1) to enter upon a hearing concerning the lawfulness of the tariffs and (2) pending the hearing and decision, to suspend the operation of the tariffs for a period no longer than seven months. Replies to the protests have been filed by each of the eight carriers.

The tariffs are identified in Appendix 1 to this order. As noted therein, the various rules contained in the tariffs have already been placed under investigation by Commission order dated June 17, 1977, No. 36611. Consideration of the tariff rates, however, was deferred

* Corrected to include changes set forth in Correction Notice dated June 29, 1977.

to the present order. The rates per barrel proposed by the respective companies are as follows:

Amerada Hess Pipeline Corporation	$6.44
Arco Pipe Line Company	6.04
BP Pipelines Inc.	6.35
Exxon Pipeline Company	6.27
Mobil Alaska Pipeline Company	6.31
Phillips Alaska Pipeline Corporation	6.22
Sohio Pipe Line Company	6.16
Union Alaska Pipeline Company	6.09

With respect to these rates, we have given careful consideration to the protests, and to the carriers' replies. In addition, we have heard oral argument by the parties. It is our conclusion that a formal investigation concerning the lawfulness of the proposed rates should be instituted pursuant to sections 15(1) and 15(7) and that because of the close interrelationship of the rate filings and the applicable rules and regulations, they should be considered in the same proceeding. We further conclude that such rates should be suspended, without prejudice to the filing of interim rates, during the suspension period.

In reaching these conclusions, we have considered the following issues: (1) whether an investigation should be instituted; (2) whether the proposed rates can and should be suspended; (3) whether interim rates can and should be authorized; (4) what level of interim rates should be authorized; and (5) what conditions should be attached to the acceptance of interim rate filings.

The institution of an investigation.

Section 15(7) of the act empowers the Commission to enter upon a hearing concerning the lawfulness of a filed tariff stating a new rate or charge. In order for a rate to be lawful, a primary requirement is that it be

just and reasonable (section 1(5)). The act sets forth other requirements as well, and if an investigation is instituted, any and all aspects of the lawfulness of the rate may be considered. However, the question raised by the protests is whether there is reason to believe the proposed rates are not just and reasonable.

Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carriers' capital costs. They also contend that the cost data provided by the carriers is overstated.

The carriers reply that their rates were computed to allow a 7 percent return on valuation, as contemplated in a 1941 consent agreement between the Justice Department and a number of shipper-owned pipelines (*United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C. decided December 23, 1941). They also assert that the standards used by protestants are unrealistic in that they do not recognize that the carriers are able to maintain high levels of debt financing only because such debt is guaranteed by the parent oil companies. The carriers argue that, without such guarantees, they would have to resort to a larger amount of equity financing, and their overall capital costs would be higher than the amounts recognized by protestants. The carriers also deny that their cost data is overstated. However, they do not object to a formal investigation of the filed rates.

For reasons set forth below, we do not accept the 1941 consent decree as a standard of reasonableness under the Interstate Commerce Act. Moreover, while there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost

data for use in applying whatever measures of reasonableness are found to be appropriate. Therefore, we conclude that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates.

The suspension of the proposed rates. Some of the carriers argue that the Commission is without power to suspend initial rates. They rely on numerous references in legislative history and past cases to exercise of the suspension power in instances of "increased" rates. They rely on such references to conclude that the power of suspension does not apply to initial rates. However, the reason that the suspension powers are usually discussed in the context of increased rates is clear: the vast majority of rate proceedings involve situations where increases in existing rates are at issue.

We see no basis in the sources cited for concluding that we may not suspend initial rates. If this were the Congressional intention, we believe that it would have been explicitly stated. It was not so stated, and the carriers have been unable to cite any direct authority for their position.

It is stated in section 15(7) that the Commission is authorized to enter upon a hearing concerning "any schedule stating a new individual or joint rate, fare, or charge." Pending this hearing and decision, the Commission may suspend, for up to seven months, the schedule being investigated. In *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo*, 321 I.C.C. 564, 566 (1963), it was said that the term "new rate" in section 15(7) encompasses "both changed and initial" rates.

Similar suspension powers pertaining to other modes of carriage are contained in sections 216(g), 218(c), 307(g), and 406(e) of the act. In each of these sections, there is "grandfather" language making the provisions

inapplicable to "initial" rates filed on or before a certain date. By implication, then, the investigation and suspension provisions *are* applicable to initial rates filed after such date.

As noted, if it were intended to exclude initial rates from the suspension power of section 15(7), one would expect specific language to this effect. No such language appears. Accordingly, we have no doubt that the suspension power is applicable to initial rates.

The carriers also question whether, even if the suspension power is applicable, we should exercise it here. They argue that protestants would not be harmed by allowing the proposed rates to go into effect, inasmuch as refunds or reparations would be available if the investigation should show that the filed rates are too high.

Protestants, however, do not consider the possibility of refunds to be adequate protection. The Arctic Slope Regional Corporation, which represents Alaskan Natives, notes that the longer it must wait for its share of royalty revenue (which are adversely affected by high transportation rates), the less value such revenue will have. Protestants also argue that the maintenance of pipeline rates at too high a level would act as a deterrent to the use of the pipeline by independent oil producers.

Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing of probable unlawfulness. Moreover, as noted by protestants, the maintenance of excessively high rates could act as a deterrent or an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil. Under the circumstances, we have concluded that the proposed rates, as filed, should be suspended,

pending our investigation, for the statutory period of 7 months.

The specification of interim rates. Protestants seek to have the Commission name specific rates that may be charged by each carrier while the investigation is being conducted. The carriers, however, contend that the Commission has no power to do so. They argue that the specification of interim rates would be a rate prescription within the meaning of section 15(1) of the act, and that we are empowered to take such action only after a full hearing.

We see no basis for considering such action to be a prescription of rates.[1] We may authorize interim rates without requiring that the rates proposed in the tariffs be cancelled, and without precluding the proposed rates from taking effect at the end of the 7-month suspension period if our investigation is not then completed (subject, however to a refund provision as hereafter described). These interim rates would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period. Such rates, if filed, remain subject to Commission scrutiny and are not to be considered as prescribed

[1] *Moss* v. *C. A. B.*, 430 F.2d 891, is clearly distinguishable. That case involved ex parte meetings and the substitution by the Board of "a complete and innovative scheme for setting all passenger rates for the Continental United States," with an indication that such a filing would not be suspended. In *Moss*, the court noted that unlike the Interstate Commerce Act, the Federal Aviation Act has no provision for reparations, thus rendering the procedural safeguards of the Aviation Act the public's sole defense. The court also pointed out its view might have been different if interim action were involved. In the present TAPS proceeding, both the proposed rates and any interim rates which may be filed *will* remain subject to full investigation. See also *Consolidated Edison Co. of New York* v. *F. P. C.*, 168 U.S.App.D.C. 92, 512 F.2d 1332, 1340, distinguishing *Moss* v. *C. A. B.* and stressing the behind-the-scenes aspect of the *Moss* case.

within the meaning of the decision in *Arizona Grocery* v. *Atchison, T. & S. F. Ry., Co.*, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348.

We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

Having concluded that we possess the power to authorize interim rates, we have no hesitation about taking such action in the present circumstances. If we were to suspend the proposed rates without allowing interim rates, the result would be to preclude the carriers from commencing their operations during the suspension period. Such a result would be contrary to the interests of all concerned.

The level of interim rates. We believe that the proper question to be asked concerning our action in these proceedings is not whether we have the discretion to authorize an interim rate. Rather, the question should be whether we have exercised such discretion in a reasonable manner.

The key to a proper exercise of our discretion in this situation lies in recognizing the possible consequences of our action. We must bear in mind that the carriers may have no means of obtaining restitution if initially required to maintain too low a rate. On the other hand, a remedy by way of refunds or reparations is available to persons injured by the charging of a rate that is ultimately found to be too high. In these circumstances,

the reasonable approach to determining an interim rate is (1) to accept the basic data supplied by the carriers and (2) at the same time to require the refund provision in the event that such amounts are ultimately determined to exceed a reasonable level. This, then, is the course that we shall follow.

The process of arriving at an acceptable interim rate requires two steps. The first is to define the basic carrier data that will be employed, and the second is to perform computations using such data.

The data that we will employ is set forth in Appendix 2. For the purposes of the present decision, we have, for the most part, employed the figures supplied by the carriers. Appendix 2 displays this data both in total dollars and in dollars per barrel. The conversion to per-barrel figures is based on the assumption that the normal traffic volume for the beginning years will be 438 million barrels a year (1.2 million barrels a day), and that this number of barrels will be apportioned among the carriers according to their respective ownership shares in the pipeline.

Of the items set forth in Appendix 2, substantial questions have been raised at this stage of the proceeding particularly with regard to removal and restoration costs and depreciation. Removal costs are the costs expected to be incurred at the end of the useful life of the pipeline in order to meet environmental requirements. According to the Alyeska Pipeline Service Company, these costs will amount to about $1.049 billion in 1977 dollars. Some of the carriers propose to simply set aside one twenty-fifth of their total share of this amount each year for 25 years. Others propose more detailed computations to inflate the removal costs to dollar costs for the year 2002, and to allow for compounded interest on the yearly accruals. The protestants, on the other

hand, seek to reduce the yearly removal charges by requiring that they be amortized over a period longer than 25 years.

With respect to depreciation charges, the carriers uniformly propose a 25-year service life, on the basis that known recoverable reserves on the North Slope are expected to be depleted in terms of economic recovery in 25 years. Protestants propose that service lives as long as 35 years be required, on the basis that additional oil fields exist on the North Slope that are likely to extend the pipeline's useful life and that even the present reserve may have a longer life than 25 years.[2]

Both of these issues will receive substantial attention during our formal investigation. However, at this stage of the proceedings, the data presented concerning additional reserves is of a somewhat uncertain nature. We do not deem this data sufficient to warrant a reduction in the amount allowed for depreciation for the purposes of determining the lawfulness of the proposed rates at the suspension level. By the same token, we will not, at this time, compute removal charges over an amortization period of more than 25 years.

For removal costs, we have used the same per-barrel allowance for each carrier, because we see no basis for cost differences among the carriers on this item. Our allowance is based on a simple amortization without inflation or discounting. While this approach may somewhat understate the amounts that need to be accrued, the magnitude of the discrepancy would not be great in terms of the overall tariff computation. It may well be outweighed by overstatement in the depreciation charges.

An additional issue is raised by protestants concerning the investment and valuation figures. It is their conten-

[2] It should be noted that at oral argument several protestants did not dispute the use of 25 years at the suspension level.

tion that these figures are affected by excessive construction costs. Needless to say, this issue will be a major focus of our formal investigation. However, as the protestants themselves concede, this is not a matter that can be properly dealt with at the present stage of the proceeding. Accordingly, the investment figure provided by the carrier will be used at this time. Our valuation staff has used the same data in providing valuation figures for present purposes.

In one aspect, the investment data shown on Appendix 2 differs from figures supplied by certain carriers in that it does not include an amount for working capital. Not all of the carriers reported working capital as part of their investment. Those that did appear to have used no consistent standard. For this reason, and because a satisfactory basis for judging the carriers' working capital needs has not been shown, we have omitted it from the investment figures.[3] We believe that our action in this respect is more than compensated by our liberality in not averaging down the investment figures for depreciation over the first few years.

Having the basic data at hand, we turn now to the question of rate computation.

In justifying the filed tariff rates, the carriers contend that the proposed rates are merely sufficient to cover expenses and interest and to allow an after-tax return on equity equal to 7 percent of their valuation. They consider this method of gauging a return on equity to be permissible since it is used in the 1941 consent agreement between the Justice Department and a large number of shipper-owned pipelines.

However, the consent decree standard has never been employed in a Commission proceeding as the test of rea-

[3] An allowance for working capital has, however been included in the staff evaluation estimates reflected in Appendix 2.

sonableness of rates. Its sole legal status is as a limit on the amount of dividends that pipelines may pay to shipper owners without risking prosecution under the Elkins Act for illegal rebates. Moreover, as a standard of reasonableness, it has nothing to recommend it from a conceptual standpoint. Although valuation is a measure of the entire investment, the consent decree standard allows a return on valuation to be used entirely to compensate one segment of the capital invested. Such a standard can have no relationship, except by coincidence, to the carriers' true capital costs. As shown in Appendix 3, the filed rates would produce returns on equity ranging from 31 percent to 96 percent. Accordingly, it can be seen that the tariff rates would produce returns exceeding capital costs, even where the carriers' own expense and investment data are accepted.

Inasmuch as the carriers' justification does not appear satisfactory, we must next consider what standards would be appropriate based on our own precedents. As we noted in No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company*, —— I.C.C. —— (1976), the standards we have applied in the past have been an 8 percent return on valuation for crude oil pipelines and 10 percent on valuation for petroleum products pipelines.

At the outset, we have questions about the appropriateness of an 8 percent return in this instance, where annual interest rates generally exceed 8 percent. The small margin of earnings in excess of interest that would result is demonstrated in Appendix 4. As may be seen, rates computed on this basis would range from $3.74 for BP to $4.16 for Exxon. Further study of this table shows that five of the eight carriers would have returns on equity of 10 percent or less under this standard, and returns for some would be lower than 3 percent. Such a return would be unreasonably low.

It should be noted that the 8 percent on valuation standard arose in the early 1940's, when capital costs were substantially lower than they are today. It could continue to provide a substantial return on original investment to established carriers, whose valuations have risen well above their actual investment because of inflation. In the case of the TAPS carriers, however, their property was constructed so recently that valuation is little higher than actual cost, and an 8 percent return on valuation becomes quite deficient.

The question arises, then, as to whether the Commission can permissibly depart from its previous standards in these proceedings. The answer lies in the fact that, whatever standards we use, the earnings allowed to the carriers must comply with governing judicial requirements. The controlling standard, set forth in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944), is that a regulated firm must be allowed enough revenue not only for operating expenses, but also for the capital costs of the business. Such revenue must cover service on the debt and a return on equity sufficient to attract capital. [See also section 15a(2).]

For the purposes of the present decision, we have determined that the standard of a 10 percent return on valuation for petroleum products pipelines is appropriate for the TAPS carriers. Our selection of the 10 percent return on valuation standard is based primarily on two factors. One is that the magnitude and inherent attributes of the TAPS project produce a higher risk factor than is normal in crude oil pipeline operations. Many of the construction features are being tested for the first time. Geographic terrain, environmental and temperature problems, possible earthquakes, vulnerability to sabotage, future oil pricing policies, and regulatory uncertainty are among the factors to be considered. More-

over, a 10 percent return on valuation appears generally sufficient to cover estimated capital costs. As previously noted, an 8 percent return on valuation produces generally insufficient returns on equity.

As shown in Appendix 5, a 10 percent return on valuation produces for the individual carriers on their actual capital structure returns on equity ranging from 13.3 percent to 54.3 percent, with no figure for Mobil which claims to be totally debt financed. The composite return on equity is 23 percent.

While these returns on equity have been challenged by protestants, the carriers note that they have an abnormally high proportion of debt in their capital structures, which is made possible by the fact that their debt obligations are unconditionally guaranteed by their parent oil companies. The carriers would argue that tariff rates based on 10 percent return on valuation provide a much lower return on equity with a more normal capital structure.

Although the 10 percent return on valuation appears suitable for present purposes, we stress that it is not intended to be a general standard nor to be a prejudgment of criteria to be used upon the conclusion of the investigation in these proceedings, nor is it in any way to be considered a prejudgment of the issues in Ex Parte No. 308.

Conditions for the acceptance of interim rate filings. The Bureau of Investigations and Enforcement asks that the carriers be required to produce a number of types of documents as a condition to our acceptance of interim rates. The carriers, however, contend that BIE's proposed condition is an attempt to circumvent the Commission's established discovery rules, and should not be adopted.

We have concluded not to impose the requested condition in the present order. We do not believe that such orders are a necessary subject for inclusion in an order disposing of petitions for suspension of a tariff. Any future request for orders can be handled as separate matters later, when all factors concerning the production of the requested data can be properly considered. In addition, we note that at oral argument, the carriers indicated their willingness to cooperate in the production of documents. We shall expect them to abide by this agreement.

The other condition requested by protestants pertains to possible refunds of excess charges collected. We recognize that even the lower interim rate levels may prove upon investigation to exceed reasonable levels. Therefore, as a condition to filing such interim rates, we will require that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective and that they agree to refund any portion of such amounts that may ultimately be established as excessive.

Immediately prior to the oral argument on June 27, 1977, the Department of Justice filed a memorandum in reply to the responses of the carriers together with a motion for leave to file. Neither the special procedure adopted in this case nor our rules of practice contemplate replies to replies and the motion for leave to file is denied.

In the paragraphs below, the tariffs of Phillips Alaska Pipeline Corporation are not included. As noted in Appendix 1, a separate order with respect to Phillips will be issued before July 20, 1977.

It is ordered, That the operation of the schedules authorized below be, and it is hereby, suspended, and that the use thereof in interstate or foreign commerce be

deferred from June 30, 1977, and to and including January 29, 1978, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to January 31, 1978, unless otherwise ordered by this Commission;

AMERADA HESS PIPELINE CORPORATION
I.C.C. NO. 2

ARCO PIPE LINE COMPANY
I.C.C. NO. 1030
on page 14, the rate of $6.04

BP INDUSTRIES, INC.
I.C.C. NO. 2

EXXON PIPELINE COMPANY
I.C.C. NO. 125

MOBIL ALASKA PIPELINE COMPANY
I.C.C. NO. 2

SOHIO PIPE LINE COMPANY
I.C.C. NO. 742
on the title page, the rate of $6.16

UNION ALASKA PIPELINE COMPANY
I.C.C. NO. 2

It is further ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as aforesaid, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant. In the event the schedules here under investigation are changed, amended or reissued, upon termination of the suspension period and the investigation not having been concluded, such changed, amended or reissued schedules will be included in this investigation.

It is further ordered, That the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the Interstate Commerce Act.

It is further ordered, That the named carriers be, and they are hereby, authorized to file, upon not less than one day's notice, interim rates not exceeding the following amounts:

Amerada Hess Pipeline Corporation	$4.85
Arco Pipe Line Company	4.91
BP Pipelines Inc.	4.68
Exxon Pipeline Company	5.10
Mobil Alaska Pipeline Company	4.84
Sohio Pipe Line Company	4.70
Union Alaska Pipeline Company	4.89

subject, however, to the condition that the carriers keep account and that (1) the interim tariffs contain a refund provision to the effect that if the rates charged exceed the rates subsequently authorized or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission with interest computed in accordance with section 15(8)(e) of the act, added by the Railroad Revitalization and Regulatory Reform Act of 1976; and (2) that the carriers file (effective on not less than 1 day's notice) a similar refund provision applicable to the original proposed rates. Although that section does not apply to pipelines, it represents the latest expression of Congressional interest, and the Commission's notice of April 14, 1977 indicated its applicability to all carriers under Part I. It should also be noted that the carriers at the oral argument expressed assent to an even higher rate of interest in the event of an investigation without suspension. Under the circumstances, we believe interest computed in accordance with section 15(a)(e) would be fair to all parties.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules, and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission. (Commissioner Brown approves the order except insofar as it denies the motion of the Department of Justice for leave to file a response to the carriers' responses).

H. G. HOMME, JR.,
Acting Secretary.

[SEAL]

APPENDIX 1

INITIAL TARIFFS APPLICABLE TO THE TRANS ALASKA PIPELINE SYSTEM

Carrier	Tariff No.	Filing Date	Effective Date
Amerada Hess Pipeline Corporation	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 1, 1977 June 1, 1977	July 1, 1977 July 1, 1977
Arco Pipeline Company	I.C.C. No. 1030	May 27, 1977	June 30, 1977
BP Pipelines, Inc.	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 3, 1977 June 3, 1977	June 20, 1977 June 30, 1977 [1]
Exxon Pipeline Company	I.C.C. No. 124 (rules) I.C.C. No. 125 (rate)	June 8, 1977 June 8, 1977	June 20, 1977 June 30, 1977
Mobil Alaska Pipeline Company	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 10, 1977 June 10, 1977	June 20, 1977 June 30, 1977 [1]
Phillips Alaska Pipeline Corporation	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 20, 1977 June 20, 1977	July 20, 1977 [2] July 20, 1977 [2]
Sohio Pipeline Company	I.C.C. No. 742	June 3, 1977	June 30, 1977 [1]
Union Alaska Pipeline Company	I.C.C. No. 1 (rules) I.C.C. No. 2 (rate)	June 15, 1977 June 15, 1977	June 30, 1977 June 30, 1977

Tariff rules filed by all of the named carriers except Phillips were placed under investigation in No. 36611 by order of the Commission served June 17, 1977. Consideration of the rates filed by those carriers was deferred to the present order.

1. Postponed from June 20, 1977.
2. Because of the later effective date of these tariffs, the time for filing protests and replies to them has not yet expired. The question of their suspension or investigation will be the subject of a separate order by the Commission, to be issued prior to July 20, 1977.

APPENDIX 2

BASIC CARRIER DATA

(000 omitted)

I&S No. 9164

		AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Operating Costs	Total	6,500[1]	90,250[1]	64,757[1]	81,900[1]	19,699[1]	6,189[1]	135,200[1]	6,499[1]	410,944
	Per Barrel	.989	.981	.983	.935	.999	.944	.926	.984	.936
Removal Costs	Total	659[2]	8,612[2]	4,648[2]	8,892[2]	2,098[2]	697[2]	13,989[2]	697[2]	41,960
	Per Barrel	.096	.096	.096	.096	.096	.096	.096	.096	.096
Investment	Total	144,081[3]	1,931,850[3]	1,467,240[3]	1,937,000[3]	459,500[3]	147,869[3]	3,138,500[3]	142,965[3]	9,268,475
	Per Barrel	21.923	21.008	21.148	20.970	20.982	20.288	21.492	19.665	21.161
Depreciation	Total	5,754[4]	77,247[4]	60,794[4]	73,700[4]	18,080[4]	6,081[4]	128,200[4]	5,750[4]	372,586
	Per Barrel	.876	.840	.862	.841	.826	.834	.864	.791	.851
Debt	Total	116,957[5]	1,614,887[5]	1,255,947[5]	1,631,250[5]	459,500[5]	120,000[5]	2,707,500[5]	129,439[5]	8,034,480
	Per Barrel	17.802	19.731	18.103	16.833	20.982	16.504	18.541	17.665	18.344
Interest	Total	11,288[6]	140,200[6]	119,880[6]	114,500[6]	32,674[6]	10,125[6]	252,480[6]	9,869[6]	689,525
	Per Barrel	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.299	1.574
Interest Rate		9.6515%[7]	7.7[illegible]%[7]	9.4667%[7]	8.0092%[7]	7.1113%[7]	8.4385%[7]	9.3256%[7]	7.2956%[7]	8.5826%
Equity	Total	27,074[8]	116,963[8]	211,293[8]	405,750[8]	-0-[8]	27,869[8]	431,000[8]	14,546[8]	1,233,995
	Per Barrel	4.121	1.272	3.045	4.633	-0-	3.764	2.951	2.001	2.817
Valuation	Total	148,000[9]	2,026,000[9]	1,541,200[9]	1,937,500[9]	484,500[9]	158,200[9]	3,271,400[9]	155,900[9]	9,733,600
	Per Barrel	22.544	22.195	22.214	22.118	22.123	21.768	22.402	21.441	22.223
Debt/Equity		81.2/18.8	93.9/6.1	85.0/14.4	77.9/22.1	100.0/0.0	81.4/18.6	86.3/13.7	89.8/10.2	86.7/13.3

FOOTNOTES TO BASIC CARRIER DATA

Amerada Hess

1. Reported in undated statement submitted by Amerada Hess entitled "General Assumptions for Calculating TAPS Tariff as of May, 1977."
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Amerada Hess' ownership share (1.50 percent).
3. Amerada Hess' share (1.50 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Amerada Hess' capitalized construction interest ($22,670,500) and capitalized overhead costs ($1,735,400) as reported by letter from R. K. Stafford dated May 13, 1977.
4. Reported in letter from R. K. Stafford dated June 1, 1977.
5. Reported in "General Assumptions" statement.
6. Reported in "General Assumptions" statement.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Arco

1. Reported in letter from J. D. Wessling dated June 1, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Arco's ownership share (21 percent).
3. Arco's share (21 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Arco's capitalized construction interest ($257,100,000), as reported in letter from J. D. Wessling dated June 1, 1977.
4. Reported in letter dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in June 1, 1977 letter.
7. Weighted average interest rate of debt issues shown in a letter from J. D. Wessling dated June 2, 1977.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

BP

1. Reported in BP's submission of June 15, 1977, in explanation of filed tariff rates.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by BP's ownership share (15.84 percent).
3. BP's share (15.84 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus BP's capitalized

construction interest and overhead costs ($204 million), with the latter as reported in BP's submission of June 15, 1977.
4. Reported in BP's submission of June 15, 1977.
5. Investment less equity.
6. Reported in a leter from P. H. Jones dated May 27, 1977.
7. Interest divided by debt.
8. Reported in a letter from P. H. Jones dated June 14, 1977.
9. Staff estimate based on reported investment figures.

Exxon

1. Reported in Appendix A to Exxon's reply to protests.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Exxon's ownership share (20 percent).
3. Exxon's share (20 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Exxon's capitalized construction interest ($242 million), with the latter as reported in a letter from J. D. Sturtevant dated March 21, 1977.
4. Reported in a letter from J. D. Sturtevant dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in Appendix A to Exxon's reply to protests.
7. Reported in Appendix A to Exxon's reply to protests.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Mobil

1. Reported in a letter from C. R. Thompson dated May 27, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Mobil's ownership share (5 percent).
3. Mobil's investment, including capitalized construction interest ($57.7 million) and capitalized overhead costs ($3.2 million) as reported in a letter from C. R. Thompson dated April 29, 1977.
4. Reported in letter dated May 27, 1977.
5. Debt presumed to be 100 percent of investment. Data filed by Mobil gives no indication of equity financing.
6. Reported in letter dated May 27, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Phillips

1. Reported in a letter from James Mullen dated July [sic; June] 20, 1977.

2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Phillips' ownership share (1.66 percent).
3. Phillips' share (1.66 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Phillips' capitalized construction interest ($14,944,000) and capitalized overhead costs ($40,000), with the latter items as reported in letter of June 20, 1977. Working capital ($1,480,000) excluded.
4. Reported in undated statement entitled "Phillips Petroleum Company—Estimate of Expenses."
5. Reported in letter of June 20, 1977.
6. Reported in letter of June 20, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Sohio

1. Reported in a letter from J. T. Boltacz dated June 13, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Sohio's ownership share (33.34 percent).
3. Sohio's investment (3,138.5 million) as reported in letter dated June 13, 1977. Working capital ($13 million) excluded. Subtracting Sohio's share of Alyeska investment would indicate $479,635,000 as capitalized construction interest and overhead costs.
4. Reported in letter dated June 13, 1977.
5. Reported in letter dated June 13, 1977.
6. Reported in letter dated June 13, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Union

1. Reported in a letter dated May 27, 1977, from E. J. Takach.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Union's ownership share (1.66 percent).
3. Union's share (1.66 percent) of Alyeska investment ($7,975 for facilities plus $16 million for land), plus Union's capitalized construction interest ($10.6 million), with the latter as reported in a letter from David M. Schwartz dated June 14, 1977.
4. Reported in letter dated May 27, 1977.
5. Reported in letter dated June 14, 1977.
6. Computed from debt description in letter dated June 14, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

APPENDIX 3
EFFECTS OF FILED TARIFF RATES

I & S No. 9164

	AMERADA HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	6.440	6.040	6.350	6.270	6.310	6.220	6.160	6.090	6.211
Less:									
Operating Costs	.989	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Taxes	1.461	1.375	1.452	1.635	1.585	1.615	1.346	1.598	1.456
Return on Equity	1.800	1.224	1.293	1.456	1.412	1.438	1.199	1.422	1.296
Percentage Returns:									
On Equity	31.5%	96.2%	42.5%	31.4%	(no equity)	38.2%	40.6%	71.1%	46.0%
On Total Investment	13.8%	13.1%	14.2%	13.2%	13.8%	14.0%	13.6%	13.8%	13.6%
On Valuation	13.3%	12.4%	13.5%	12.5%	13.1%	13.0%	13.1%	12.7%	12.9%

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I&S No. 9164

APPENDIX 4
TARIFF COMPUTATION
ALLOWING 8 PERCENT RETURN ON VALUATION—ACTUAL CAPITAL STRUCTURE

	AM HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (RATE)	3.881	3.965	3.739	4.160	3.903	3.905	3.749	3.975	3.892
Less:									
Operating Cost	.989	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Tax	.107	.277	.071	.519	.312	.390	.071	.479	.229
Return on Equity	.095	.247	.063	.462	.278	.348	.063	.426	.204
Percentage Returns:									
On Equity	2.3%	19.4%	2.1%	10.0%	(no equity)	9.2%	2.1%	21.3%	7.2%
On Total Investment	8.3%	8.4%	8.4%	8.4%	8.4%	8.6%	8.3%	8.7%	8.4%
On Valuation	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%

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APPENDIX 5
TARIFF COMPUTATION
ALLOWING 10 PERCENT RETURN ON VALUATION—ACTUAL CAPITAL STRUCTURE

	AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Basis)	4.947	4.908	4.921	5.109	4.942	4.889	4.700	4.885	4.895
Less:									
Operating Costs	.869	.861	.868	.866	.869	.844	.865	.864	.868
Depreciation	.576	.840	.862	.841	.826	.584	.564	.791	.851
Removal Costs	.006	.006	.006	.006	.006	.006	.006	.006	.006
Less Interest	1.718	1.634	1.714	1.807	1.642	1.863	1.770	1.889	1.571
Less Taxes	.515	.775	.589	1.016	.909	.879	.574	.980	.728
Return on Equity	.548	.690	.507	.905	.720	.783	.511	.855	.648
Percentage Returns					(no equity)				
On Equity	13.90%	54.25%	10.05%	19.64%	10.54%	20.90%	17.32%	42.73%	23.00%
On Total Investment	10.34%	10.54%	10.50%	10.53%	10%	10.74%	10.42%	10.90%	10.50%
On Valuation	10%	10%	10%	10%	10%	10%	10%	10%	10%

RONEY, Circuit Judge, dissenting:

I respectfully dissent. The thesis of the Commission is that it has the unreviewable authority to suspend the pipeline's initial rate filing and, as an adjunct of that authority, it has the power to fix an unreviewable interim rate for the seven month period. The idea that the Commission can set an unreviewable rate without following the statutory ratemaking procedures runs counter to the entire plan established by Congress in the Interstate Commerce Act.

This is ratemaking. We should not hide from that fact. The Commission candidly admits that it is making an interim rate. To suggest that the rate is "voluntary," that no rate has been set by the Commission because theoretically the pipeline companies could accept the seven month stay and not file for the interim rate, exalts form over substance in a way rarely countenanced by this Court. The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the respondents. Without a filed tariff, no oil can flow. No one has made the slightest suggestion in brief or oral argument that it would be either in the public or private interest for the transportation of this oil to be suspended for seven months while the Interstate Commerce Commission determines whether or not the proposed tariff is reasonable and just. *See* 43 U.S.C.A. § 1651 et seq. (Supp. 1977). We are given to understand that the rate here under consideration does not affect the price of oil at the delivery point, or the eventual price to the consuming public. Any transportation cost adjustment affects only the wellhead price of oil. Although there is almost complete identity between the affiliates which own the pipeline and those who receive the wellhead price, there are some others involved, and the royalty to the State of Alaska and property owners varies with the wellhead price.

The argument that this is not ratemaking because it is only an interim and not a permanent rate loses force in numbers. The pipeline companies claim the difference between what they should get and what they will get under the interim rate could amount to $340,000,000. This sum is undoubtedly greater than the amount at stake in many permanent rates subject to ICC approval.

Although *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963), and *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), are cited for the proposition that the grant or denial of a suspension order is not reviewable, they in fact only hold that a court has no authority at all to suspend a rate and that an ICC refusal to suspend is not reviewable under any statutory standard. They do not hold that a suspension order is unreviewable under constitutional due process standards. I would think that a suspension order in this case, where the lack of any tariff would effectively close down the Alaska Pipeline for seven months, and would eliminate any method of transporting the oil from the Alaska oil fields for that period of time, would be reviewable on a constitutional due process standard.

We are not confronted, however, with just a suspension order. The order before us is schizophrenic. It is both a suspension order *and* a ratemaking order.

This is a situation never previously confronted by the courts. In most situations, if a new rate is submitted to the ICC and the agency chooses to suspend it, this merely means that the carrier involved will continue to charge the rates already in existence. Thus the ICC need not take further action to ensure that the carrier can stay in business and collect charges that at least at one time were assumed to be reasonable, during the seven month period. Here, however, the Commission

was faced with a brand new entity. The Trans-Alaska Pipeline System had no preexisting rate schedule when it filed its "new" rate with the ICC. Thus, after deciding to suspend the filed rate, the ICC was faced with a situation which left no legal rate in effect for the seven month period. Unwilling to allow the pipeline to shut down, the Commission had to promulgate what is a "second" order, a ratemaking order.

Rate setting orders are clearly reviewable under the statute. Therefore I would not review the possible legality of just a suspension order here. I would accept this case for what it is: an attempt by the Commission to do two things, the first of which it would not do had it not the power to do the second. There is no indication in anything before us that the Commission would suspend the proposed tariff if it could not set an interim rate. Thus I would not reach the constitutional considerations that might demand review of a suspension order alone in this unique situation. There is no indication that the Commission would follow such a course. Its claimed authority to do so becomes merely the theoretical exercise of power onto which it hangs its ability to set an interim rate.

So I would assume without deciding that the Commission has the power to suspend the initial rate and go to the question of whether it can set the interim rate in the manner done here. If the interim rate cannot stand, I would send the case back to the Commission for whatever action it wishes to take within the confines of its legal authority. If it chooses to suspend without an interim rate, then on review a court could consider whether that action alone under the circumstances of this case can withstand the due process requirements of the Constitution. Or, if it chooses to arrive at some interim rate through procedures that have some resemblance to the ratemaking procedures which Congress had

required, that too could be reviewed. However, I do not think that in order to decide the case before us we need to make any definitive decision as to whether an initial rate suspension alone, under the facts of this case, would be legal, or whether the Commission can ever set interim rates in connection with a rate suspension. All I would now hold is that the Commission has no authority to do what it did here.

United States v. *Chesapeake & Ohio R.R.*, 426 U.S. 500, 96 S.Ct. 2318, 49 L.Ed.2d 14 (1976), is the only controlling authority relied upon for the proposition that interim ratemaking is a necessary power under the suspension authority. In deciding that interim ratemaking is unreviewable, the majority opinion completely overlooks the fact that the Supreme Court considered the "conditions" imposed on the proposed tariff there to be reviewable.

> In this Court, Chessie has argued that . . . the application of the Commission's action to it is arbitrary and capricious. . . . Since the District Court held that the Commission did not have the power to impose conditions on the refiling of the tariff, it did not address this question. Chessie, if it chooses, may raise the matter on remand in the District Court.

426 U.S. 515, 96 S.Ct. at 2326. To distinguish the point on the ground that in *Chessie*, the rate was permanent, must also distinguish the case beyond support for the proposition espoused in the case at bar.

This case is factually and legally different from *Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir. 1971), relied upon by the majority. There the initial decision had been made to suspend the effective date of the proposed increase in tariffs. There was a tariff in effect after suspension, one which had already

been determined to be reasonable either through Commission action or lack of complaint. The suspension order was concededly within the sole discretion of the Commission, and *all* that was involved was timing. The Commission offered to let the carrier collect an interim increase, if it chose to do so. For two reasons that case is not helpful here.

First, in that case, there was a good faith suspension order of the rate increase which did not cut off services. Here there is *no* indication that the Commission would suspend the tariff and consequently cause a seven month delay in service. In fact, we are told that in oral argument before the Commission, the director of the Commission's Bureau of Investigation and Enforcement indicated the owners of the pipeline might be subject to civil or criminal penalties if they did not file for these "voluntary" interim rates. Such view would dispel any thought that the public interest required a rate suspension. This is pointed out not to suggest that a suspension order would be reviewable under the statutory public interest standard, but only to emphasize that the Commission has made no such decision upon which to hang the *Port of New York Authority* holding.

Second, the pipeline companies' choice is not whether to adhere to present rates for seven months, or accept an interim increase, as was the case in *Port of New York Authority*, but whether to do business at all, or accept an interim rate. This does not make acceptance or rejection of the interim rate the viable choice that was available in that case.

The interim rate being reviewable, the next question is whether it can stand. Even if the Commission is permitted some leeway, and allowance is made for the fact that it "pursued a more measured course and offered an alternative tailored far more precisely (than a simple suspension) to the particular circumstances presented,"

Chessie, 426 U.S. at 514, 96 S.Ct. at 2325, the manner of arriving at the interim rate was beyond the most liberal reading of its statutory authority.

Congress has set well-established limits on the ICC's power to make rates. First, historically, the ICC did not have ratemaking power. It could set aside a rate as being unreasonable, but the Supreme Court found no implied power to set a reasonable rate. *ICC* v. *Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U.S. 479, 17 S.Ct. 896, 42 L.Ed. 243 (1897). Only nine years later did Congress amend the Act to give the ICC power to set maximum rates, Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 589, and not until 1920 was it given power to set minimum rates, Act of Feb. 28, 1920, ch. 91 § 418, 41 Stat. 484.

Second, the ICC has the power to set rates *only after* it has determined that a proposed rate is unreasonable. That principle has been reiterated in several cases which indicate that it is the carriers who have the right to propose initial rates. *ICC* v. *Louisville & Nashville R. R.*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913) ("Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order." 227 U.S. at 92, 33 S.Ct. at 187). *See also New York* v. *United States*, 331 U.S. 284, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947); *United States* v. *Illinois Central R. R.*, 263 U.S. 515, 522, 44 S.Ct. 189, 68 L.Ed. 417 (1923); *Southern Pacific Co.* v. *ICC*, 219 U.S. 433, 31 S.Ct. 288, 55 L.Ed. 283 (1911); *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 118-119, 28 S.Ct. 493, 52 L.Ed. 705 (1908).

Third, a proposed rate can be found unreasonable *only after* a full hearing. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262, 52 S.Ct. 146, 150, 76 L.Ed. 273 (1932) ("The legal standards governing the action of the Commission in determining the reasonableness of the rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement.") The courts have consistently held that a finding by the ICC of unreasonableness of the rate proposed by the carrier must be supported by substantial evidence on the record as a whole. *Atchison, Topeka & Santa Fe Ry. Wichita Board of Trade*, 412 U.S. 800, 806, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271, 46 S.Ct. 500, 70 L.Ed. 941 (1926); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562, 39 S.Ct. 375, 63 L.Ed. 772 (1919); *Archer Daniels Midland Co.* v. *United States*, 301 F.Supp. 328 (D. Minn. 1969) (3-judge court); *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 282 F.Supp. 430, 434 (D. Kan. 1968) (3-judge court).

Last, the ICC can establish a rate only after a *full evidentiary hearing. Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262, 52 S.Ct. 146, 76 L.Ed. 273 (1932); *ICC* v. *Louisville & Nashville R. R.*, 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431 (1913). That hearing requirement is not satisfied by the "brief and informal hearing" which accompanies a suspension order. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963). The case for strict enforcement of the hearing requirement is particularly strong because this rate applies to so few companies, and the administrative inconvenience of multiple parties which sometimes justifies lowered procedural standards is not present. *Compare Londoner* v. *Denver*, 210 U.S. 373,

28 S.Ct. 708, 52 L.Ed. 1103 (1908) (individual property assessment without hearing invalid) with *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915) (city-wide revaluation does not require individual adjudication). Even in the multi-party rate cases administrative hearings have withstood attack only when the agency granted adequate notice and opportunity to comment both on the original rate proposal and on the comments made by others. *See Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1074-1076 (5th Cir. 1975), *cert. denied sub nom., California Co.* v. *FPC*, 426 U.S. 941, 96 S.Ct. 2660, 49 L.Ed.2d 394 (1976).

In this case where is the finding of unreasonableness of the proposed rate on an evidentiary record, and where is the record to support the interim rate? The Commission readily admits that it cannot support either finding by record evidence.

But procedural unfairness is only the beginning of the arbitrariness in this case. The real difficulty, and the problem that makes the procedural shortcuts so detrimental to the petitioners, is that Congress through the Act has provided a reasonable way to protect *all* parties in this proceeding against the effect of error in the proposed rate, but the Commission has, without offer of justification, ignored it in the proposed interim tariff. If the rate is determined to be too high, the carriers may be forced to refund, with interest, 49 U.S.C.A. § 15(7) (Supp. 1977), or pay back as damages, with costs and attorneys' fees, 49 U.S.C.A. § 8, an overcharge collected prior to rate determination. In other words, the parties overcharged can be made whole. If the interim rate is too low, however, the ICC program provides no means whatsoever for the pipeline to recover the difference between what it was required by the Government to charge, and what that same Government later decides would

have been a reasonable rate. To have a way to protect all interests, and not take it, and subject one party to the possibility of irreparable loss, is impermissible under even the most deferential standard of judicial review.

The complainants argue that a system of refunds would produce justice at the price of delay. Even justice delayed, however, is preferable to justice forever denied. At oral argument, Commission's counsel suggested no harm had been done because the interim rate is the highest rate that could reasonably be established for the pipeline. That statement constitutes a gross prejudgment of what the ICC will do, and overlooks entirely the reviewable nature of the Commission's ultimate ratemaking action. Without a sufficient record to support a finding of anything at all, and with serious questions about the rate of return, the treatment of inflation, and allowances for depreciation, counsel would have this Court predict what Commissioners, who may not be in office now, will do on the evidence presented them, and what a court of judges, who may not be in office now, will do on review of whatever those Commissioners do.

Nor can this Court sustain the interim rate by obeisance to the expertise of the Commission. Only after a full hearing upon complaint made does the law give weight or significance to the opinion of the Commission. *Atlantic Coast Line R. R.* v. *ICC*, 194 F. 449 (Commerce Ct. 1911). The expertise of the Commission can only be relied upon after it has exercised its expert judgment on the record before it. *See* Pedersen, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975).

Hence I would hold that the Commission had no authority to set in the way it did the interim rate which was forced upon the carriers. I would set aside that proposed interim rate for these reasons: *first*, the Commission did not even attempt to follow congressionally man-

dated procedures for setting rates; *second*, without some specific finding of unreasonableness in the proposed rate, it appears arbitrary not to follow the statutory plan by which all parties could be protected against any eventual rate determination, and to follow a course which would cause irreparable damage to the pipelines if their position is eventually sustained; *third*, the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital, a rate arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor.

I would set aside the Commission's Order of June 28, 1977 and remand the case to the Commission for further consideration consistent with its statutory authority.

APPENDIX B

INTERSTATE COMMERCE ACT, 49 U.S.C.

Section 15(1):

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the

minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(7):

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for

or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-457

EXXON PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-457

EXXON PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Exxon Pipeline Company (Exxon), hereby submits to the Court the attached Supplement to its previous filings in this proceeding.[1] The Supplement is a copy of an Order of the Interstate Commerce Commission issued September 27, 1977, in ICC Investigation and Suspension Docket No. 9164, *et al.*, the ICC proceeding which is at issue in petitioner's filings before this Court. The Commission's September 27 Order, in brief, denies

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[1] On September 22, 1977, petitioner Exxon filed with this Court three documents: (1) Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; (2) Application for Stay of Mandate of United States Court of Appeals for the Fifth Circuit And Stay of Order of the Interstate Commerce Commission; and (3) Motion to Accelerate Consideration. The attached Supplement is pertinent to all three documents.

various petitions for reconsideration and other requests for affirmative relief filed by respondents and protestants in response to the Commission's June 28 Order. Three dissenting Commissioners would have, *inter alia*, granted respondents an increase of 42 cents per barrel in the Commission's prescribed interim rates. (Supplement, p. 7).

Reference was made to Exxon's Petition for Reconsideration and Supplement thereto pending before the ICC in petitioner's Petition for Writ of Certiorari (p. 18 n. 10). The effect of the Commission's September 27 Order, denying Exxon's and other parties' petitions for reconsideration, is to remove any remaining uncertainty about the irreparable losses which Exxon and the other owners of TAPS will suffer if this Court does not grant the relief sought. The estimates of those losses and other factual information presented in petitioner's filings are unaffected by the Commission's September 27 Order.

Respectfully submitted,

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INTERSTATE COMMERCE COMMISSION

ORDER

INVESTIGATION AND SUSPENSION
DOCKET NO. 9164 [1]

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

[Service Date Sep. 27, 1977]

By orders of June 28, 1977,[2] and July 19, 1977,[3] we instituted investigations into the lawfulness of initial tariff rates filed by eight pipeline companies for transportation of crude petroleum over the Trans Alaska Pipeline System. We also suspended the operation of those rates for periods of seven months and authorized the filing of lower interim rates for use during the suspension period. Petitions for reconsideration of various aspects of our orders have been filed both by the pipeline companies and by parties challenging their tariffs.[4]

On petition, one or more of the carriers contend: (1) that higher interim rates should be authorized on the basis that traffic volume during the suspension period

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[1] Embraces Investigation and Suspension Docket No. 9164 (Sub-No. 1), Trans Alaska Pipeline System (Rate Filings); Docket No. 36611, Trans Alaska Pipeline System (Rules and Regulations); and Docket No. 36611 (Sub-No. 1), Trans Alaska Pipeline System (Rules and Regulations).

[2] I. & S. No. 9164, affecting Amerada Hess Pipeline Corporation, Arco Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Corporation, Sohio Pipe Line Company, and Union Alaska Pipeline Company.

[3] I. & S. No. 9164 (Sub-No. 1), affecting Phillips Alaska Pipeline Corporation.

[4] The petitions and replies to them are identified in the appendix to this order.

will average less than the 1.2 million barrels a day assumed in the Commission's orders; (2) that the yearly charges recognized for removal and restoration costs should be increased to account for inflation and taxes; (3) that a greater percentage return on valuation should be allowed; and (4) that the suspension periods for Phillips and Amerada Hess should be modified. These contentions will be discussed individually.

In our order of June 28th, we assumed that the carriers' normal traffic volume, or "throughput," for the beginning years would be 1.2 million barrels a day. We used this assumption in converting the carriers' total costs to per-barrel costs, for the purpose of finding suitable interim per-barrel rates. The carriers now seek a decrease in the assumed throughput, which would result in higher costs per barrel, and thus, higher interim rates.

The carriers do not deny that 1.2 million barrels is the amount that they reported to the Commission as their expected normal daily throughput (prior to any future expansion of pipeline capacity). However, they now take the position that, in authorizing an interim rate for a seven-month suspension period, the Commission should consider only the traffic volume expected during that period. They note that throughput during the suspension period will be lower than normal volume for two reasons: (1) there is an expected lower-volume startup period, variously estimated to last from several weeks to as long as four months, and (2) the occurrence of a fire at Pump Station 8 has imposed a substantial additional delay on the attainment of normal traffic volume.

We find insufficient basis in the petitions for modifying the throughput assumption upon which the interim rates were computed. At the time of our previous orders, we were indeed aware that there would be a startup period in which throughput would be below normal. Neverthe-

less, we did not consider it suitable to use the throughput level of a short initial period, such as the suspension period, as the basis for finding per-barrel costs. The interim rates were intended to be preliminary estimates of maximum lawful rates for the services proposed in the tariff. Therefore, the cost data and the throughput assumption that we used were related to expected typical conditions of pipeline operation. The petitions show no reason to conclude that the throughput figure used was erroneous on the basis of the data previously before the Commission.

Nor do we believe that the carriers' assertion of changed circumstances resulting from the pump station fire warrants a modification of the throughput assumption. The carriers contend that this accident will have a severe and rather long-lasting effect on throughput. In some of the petitions, it is estimated that throughput will not exceed 800,000 barrels a day during the suspension period, and may be much less. Phillips and Exxon report an estimate that daily volume will range from 617,000 barrels in August 1977 to 690,000 barrels in December 1977; Phillips further asserts that the 690,000 barrel level may not be exceeded until the third quarter of 1978.

There are two reasons why these assertions do not warrant a change in our throughput assumption. First, the risk of setbacks such as the pump station fire was taken into account when we chose the rate of return on valuation to be allowed in computing interim rates. Second, the carriers have provided no data and little explanation to support their projections of lower throughput. We do not know, for example, how much daily throughput capacity was lost specifically from the destruction of pump station 8; when pump station 8 is expected to be restored to service; why this amount of time would be required; what other factors enter into the carriers' throughput estimates; what means other than the rebuilding of pump station 8

are available to increase the throughput; whether such means will be employed, and to what effect.

In short, our prior orders were made in recognition both of an expected initial period of low throughput and of the risk of operating problems. The information subsequently submitted by the carriers is insufficient to establish circumstances very different from what we previously contemplated. Therefore, the request for use of a different throughput assumption in computing authorized interim rates will be denied.

Turning to the carriers' other contentions, the question of the appropriate allowance for removal costs was fully considered in our previous orders, as was the question of the appropriate rate of return standard for use at the suspension level. No warrant for modification of those conclusions has been demonstrated.

Amerada Hess and Phillips each seek modification of the termination dates of their suspension periods, which are later than the termination dates for the other six carriers. The tariff of Amerada Hess had a proposed effective date one day later than the others. Its tariff, like the others, was suspended for a period of seven calendar months. However, as a result of the differing lengths of the included calendar months, its suspension period extends two days beyond the others. It seeks to have its suspension period shortened by one day, to have the same number of days' duration as the others.

Phillips' tariff was filed with an effective date 20 days later than the others, and therefore its suspension period expires 20 days later. It seeks to have its suspension period shortened to expire on the same day as the others.

These requests for shortened suspension periods will be denied. The statutory seven-month suspension period was established by Congress for the protection of the public. Under present circumstances, we do not believe that the

public should be deprived of that protection by the use of a shorter suspension period than the law allows. As an incidental matter, we note that, in the June 28th order, the omission of the words "and including" from the description of the last day of the suspension period for Amerada Hess was inadvertent, and will be corrected in this order.

In addition to respondents' petitions for reconsideration, Phillips also filed a request for stay of the suspension of its tariff rate. In this pleading it argues that a refund provision without suspension would avoid harm to it while adequately protecting shippers. Arguments of this nature were fully considered in the Commission's previous orders, and no reason for modification of those conclusions has been shown. The request for stay will be denied.

It is contended by the protestants in their petitions (1) that the Commission should extend the duration of its suspension period beyond the specified seven months to the full period of the investigation, or seek legislative authority to do so; (2) that the suspension periods should be calculated from the date of readiness to provide for-hire service, rather than from the effective dates of the tariffs; (3) that the authorized interim rates should be reduced on the basis of different conclusions regarding valuation, tax allowances, and depreciation charges; and (4) that refunds should be provided for at a 10 percent rate rather than at the lower rate resulting from the application of section 15(8)(e) of the Interstate Commerce Act.

We find no basis in protestants' petitions for modification of the conclusions in our orders. The seven-month duration of the suspension period is clearly specified in section 15(7) of the act, and is an expression of a carefully considered Congressional policy. Similarly, the date of commencement of the suspension period is clearly in-

dicated in section 15(7) as being the proposed effective date of the tariff. The proper standards of cost and investment for the authorized interim rate were fully considered in our previous orders, and no reason for modification of those conclusions has been demonstrated. Finally, we do not agree that refunds should bear interest at a rate equal to the authorized rate of return of valuation, where there is no similarity in the risk characteristics of the respective uses of funds. Protestants' petitions, accordingly, will be denied.

Finally, in its "response" to petitions for reconsideration, Sohio makes the request, not previously made by any party in these proceedings, that interim rates for all of the carriers be authorized at the same level. Such a request for affirmative relief in a reply pleading is neither authorized by our General Rules of Practice nor fair to the other parties. Moreover, the requested action would result in different standards of profitability being applied to different carriers, without demonstrated necessity or justification. The request is without merit, and will be denied.

It is ordered, That our order of June 28, 1977, in Investigation and Suspension Docket No. 9164 is clarified and corrected by the insertion of the words "and including" after the words "suspended to" in the next-to-last line of the first ordering paragraph.

It is further ordered, That the petitions for reconsideration and other requests for affirmative relief contained in the pleadings described in the appendix to this order are denied.

Decided September 20, 1977.

By the Commission.

H. G. HOMME, JR.
Acting Secretary

(SEAL)

COMMISSIONER MURPHY, whom COMMISSIONERS STAFFORD AND MACFARLAND join, dissenting in part:

In light of circumstances presented on petition, including the reduction in the estimated volume of oil moving per day, I believe that respondents should be allowed an increase of 42 cents per barrel in the interim levels. The interests of parties in opposition are adequately protected by the refund provisions applying to the interim level of rates.

With respect to the request by some respondents that the suspension period be altered, it should be pointed out that the Commission can establish a shorter period where appropriate. As a matter of convenience, an identical expiration date of the suspension period, namely January 29, 1978, would be most appropriate, again giving due consideration to the fact that the parties in opposition are protected by other refund provisions.

I would deny the petitions in all other respects.

APPENDIX

Description of Petitions, Replies, and Other Pleadings which are the Subject of the Present Order

Filed:	PETITIONS
July 8	Petition of Exxon Pipeline Company for Reconsideration
July 22	Supplement to Petition of Exxon Pipeline Company for Reconsideration
July 25	Petition of the Bureau of Investigation and Enforcement for Reconsideration and Statutory Clarification of the Commission's Suspension Orders
July 25	Petition of ARCO Pipeline Company for Reconsideration
July 27	Petition of Union Alaska Pipeline Company for Administrative Review
July 27	Petition of Amerada Hess Pipeline Corporation for Reconsideration or Clarification
July 27	Petition of Mobil Alaska Pipeline Company for Reconsideration
July 28	Petition of Phillips Alaska Pipeline Corporation for Reconsideration and Revision
July 28	Petition of BP Pipelines Inc. for Reconsideration and for Permission to File a Revised Rate
July 28	Petition of the State of Alaska for Reconsideration
	REPLIES
July 18	Reply of the Arctic Slope Regional Corporation to the Petition of Exxon Pipeline Company for Reconsideration and to Application for the Stay of the Order Served June 28, 1977

July 19	Reply of the United States Department of Justice to the Petition of Exxon Pipeline Company for Reconsideration
July 28	Reply of the Bureau of Investigation and Enforcement to Petitions for Reconsideration filed by Exxon Pipeline Company and ARCO Pipeline Company
August 15	Joint Response to Petition of the Bureau of Investigation and Enforcement to extend the TAPS Suspension Periods
August 15	Joint Response to Petition of the State of Alaska for Reconsideration
August 16	Response of Sohio Pipeline Company to Petitions for Reconsideration
August 17	Consolidated Reply of the United States Department of Justice to Petitions of the Respondents for Reconsideration of the Commission's Orders of June 28, 1977 and July 18, 1977
July 28	Request for Stay of Suspension Order Dated July 19, 1977 (filed by Phillips Alaska Pipeline Corporation)
August 10	Opposition of the Bureau of Investigation and Enforcement to Phillip's Request for Stay of the I&S Order

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CERTIFICATE OF SERVICE

I, Richard J. Flynn, counsel for petitioner Exxon Pipeline Company and a member of the bar of this Court, hereby certify that, pursuant to Rule 33, copies of Exxon Pipeline Company's Supplement to Petition for Writ of Certiorari have been served upon all parties to the proceeding below and upon the additional parties listed below via first class mail, postage prepaid by depositing the same in the United States Postal Service at Washington, D.C. this 27th day of September, 1977:

Wade H. McCree, Jr., Esquire
Solicitor General
Department of Justice
Washington, D.C. 20530

H. G. Homme, Jr.
Acting Secretary
Interstate Commerce Commission
Washington, D.C. 20423

Edward W. Wadsworth, Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

/s/ Richard J. Flynn
RICHARD J. FLYNN

IN THE

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY OF EXXON PIPELINE COMPANY TO THE BRIEFS IN OPPOSITION OF RESPONDENTS

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November 10, 1977

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY OF EXXON PIPELINE COMPANY TO THE BRIEFS IN OPPOSITION OF RESPONDENTS

The briefs in opposition to the petitions for certiorari are primarily devoted to the same arguments which were raised, unsuccessfully, in opposition to the petitioners' stay applications. Those arguments have not gained in merit with the passage of time.

The federal parties continue their attempt to abolish all restraints on abuse of the suspension power. Despite

the narrow language used in the carefully drafted *Chessie* opinion (*United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500 (1976)), they continue to claim that *Chessie* overruled *Moss* v. *CAB*, 430 F.2d 783 (D.C. Cir. 1970), "insofar as the decision in *Moss* purports to place general limitations on a regulatory agency's ability to use its suspension power to induce the filing of a modified rate tariff . . . ."[1] This attempt by the government to eliminate all restraints against arbitrary abuse of this potent regulatory tool serves only to emphasize the importance of this case and the need for plenary review.

We have previously answered this attempt to pervert the holding of *Chessie* (Petition, pp. 19-20), and will not again do so here. However, there are three arguments made in the briefs in opposition which we have not previously addressed. These are: (1) the argument that abuse of the suspension power is not subject to judicial review; (2) the argument that the particular interim rates imposed by the Commission were reasonable; and (3) the argument that the validity of the refund condition is not presently ripe for review. We address those arguments in turn.

A. Abuse of the Suspension Power Is Subject to Judicial Review

The Alaskan Respondents base their arguments on the premise that exercise of the suspension power is not subject to judicial review. Like Judge Roney, we believe that this issue need not be reached in this case because of the dual nature of the Commission's action, combining as it does a suspension order and a ratemaking order in one document (Pet., p. 41a).[2] If the Court

[1] Brief in Opposition of the Federal Parties, at 12.

[2] *Cf.*, *United States* v. *SCRAP*, 412 U.S. 669, 693 n. 17 (1973), where the Court considered the applicability of *Moss* to the Commission order before it, but concluded that the particular conditions attached to the Commission's refusal to suspend "did not, in any meaningful sense, transform the carrier-made rate into a Commission-made rate." Implicit in the Court's analysis is an acceptance of the *Moss* theory that rates forced on carriers through use of the suspension power are agency-made rates. Moreover, the Court did not repudiate the District Court's suggestion that if *Moss* did apply, it would be an "alternative ground for avoiding the *Arrow* decision." *Id.*

does reach this issue, however, it should rule that an order suspending a carrier-initiated rate, unlike a refusal to suspend, is subject to judicial review.

No claim could be made that judicial review of such an order is precluded under the general test this Court has evolved for determining reviewability. In *Dunlop* v. *Bachowski*, 423 U.S. 814 (1975), for instance, the Court allowed review of a decision at least as discretionary as a suspension decision, namely, a government decision not to file an enforcement action.

The Alaskan respondents apparently contend, however, that the general principles governing judicial review are rendered inapplicable to the suspension power by this Court's decisions in *United States* v. *SCRAP*, 412 U.S. 669 (1973), and *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658 (1963). This claim must founder on the fact that *SCRAP*, the more recent of the two cases, while clearly holding that a court has no power to enjoin the implementation of railroad rate schedules which the Commission refuses to suspend, specifically left open the question of whether a decision to suspend rates was subject to judicial review and the question whether suspension decisions should be reviewed when a claim was made, as it is here, that the Commission had acted beyond its statutory powers. 412 U.S. at 698 n. 22. It also ignores the fact that in *Chessie*, a suspension case, this Court considered at length the legality of the Commission's action, and remanded the case for further judicial review in the District Court. *United States* v.

Chesapeake & Ohio R. Co., 426 U.S. 500 (1976). Finally, respondents' claim is based on a careless reading of *SCRAP* and *Arrow*. Those cases were based on the concept of primary jurisdiction, *see Atchison, T. & S.F. R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 820 (1973), and held only that a court may not itself suspend rates. That question of relief is far different from the question of whether a court may review an agency's exercise of its suspension power to determine whether the agency has acted within the scope of its statutory powers or has abused its discretion.[3] *Cf. Dunlop* v. *Bachowski, supra*, 423 U.S. 814, in which the Court allowed judicial review while reserving the question of injunctive relief. See also *Wichita Board of Trade, supra*, 412 U.S. at 822-826.

Thus, the respondents' attempt to immunize abuse of the exercise of the suspension power from judicial review must fail. It is unsupported by the cases on which they rely, and inconsistent with this Court's subequent decision in *Chessie*.

B. The Interim Rates Were Unreasonable

The respondents contend, and the Fifth Circuit held, that both the decision to impose interim rates and the

[3] A significantly different question is involved when the agency does *not* suspend filed rates than when it does. Unlike a suspension order, which must include a statement in writing of the reasons for suspensiofi. a refusal to suspend need not be accompanied by a statement of reasons. See 49 U.S.C. § 15(7); *Oscar Mayer & Co.* v. *United States*, 268 F.Supp. 977, 981 (W.D. Wis. 1967). This is clear evidence that a refusal to suspend is not judicially reviewable. *Cf. Morris* v. *Gressette*, 45 U.S.L.W. 4773, 4776 (June 20, 1977). Moreover, because shippers can be fully protected by refund conditions or reparations orders, there is less need for judicial review when an agency decides not to suspend an increase. When an increased rate is suspended, the carrier cannot be made whole for any undercollection of revenues during the suspension period, and, as in the present case, if an initial rate is suspended, the carrier cannot perform the proposed service at all.

level of the interim rates are beyond the scope of judicial review. In an effort to make this extraordinary assertion more palatable, the respondents now contend that the particular result in this case is not unjust. Even if that factual assertion were true, it would be irrelevant to the legal issues in this case, for the issues here concern the validity of a holding which makes no distinction between just and unjust agency action. More importantly, the respondents' factual assertion is false, for the rates imposed here were manifestly unreasonable. This case illustrates the danger created by the Fifth Circuit holding, namely, the danger that arbitrary and unreasonable interim rates will be imposed without a full hearing.

While this is obviously not the time to argue in detail the merits of the Commission's prescribed interim rates, there are two major flaws in the Commission's ratemaking methodology in this case which should be mentioned briefly. First, the Commission failed to take into account the fact that the TAPS "initial" level of throughput actually cannot be reached until 1978. The maximum possible throughput during the suspension period is far lower. As a result, the owners cannot ship enough barrels of oil to earn the revenues allowed by the Commission. To obtain the return on investment which the Commission found proper, the owners would have to charge *more* during the suspension period than the proposed long-term rates which the Commission suspended. To achieve the rate of return authorized by the Commission at the reduced throughput during the start-up period, Exxon, for instance, would have to charge roughly $9.00 per barrel, as opposed to the $6.27 in its original filing or the $5.10 allowed by the Commission.[4]

The second major error in the Commission's rate calculation relates to the treatment of the enormous expense

[4] Supplement to Petition of Exxon Pipeline Company for Reconsideration, ICC I&S Docket No. 9164 (filed July 22, 1977).

of restoring the terrain on which the pipeline was built to its original state at the end of the pipeline's life. The Commission allowed collection of an annual sum which will be grossly insufficient to cover this expense, in part because the Commission failed to allow for the fact that the amount collected will be subject to the federal income tax. As a result, at the end of the pipeline's economic life, Exxon would have only $233 million to meet an estimated $466 million liability.

We will not respond here to the attempt of the Alaskan respondents to raise in this Court several attacks on the proposed rates which were not found persuasive even by the Commission. It is enough here to note that the respondents' ill-conceived, result-oriented efforts to defend an untenable legal theory must fail, for the result reached by the Commission in this case is both unsupportable and unjust.

C. Ripeness of the Dispute Concerning the Refund Condition

The Alaskan respondents contend that there is no present case-or-controversy concerning the validity of the refund condition. That argument verges on the frivolous. The effect of the Commission's order was to require Exxon to take certain action—file an amendment to its proposed tariff including a refund condition. If Exxon had failed to do so, it would not have been allowed to use its share of the pipeline capacity. Whether Exxon was required to comply with this directive was certainly a live issue; the Commission's order was reviewable because it had an immediate impact on Exxon's rights and obligations. *See Pennsylvania Railroad* v. *United States*, 363 U.S. 202, 205 (1960); *City of Chicago* v. *United States*, 396 U.S. 162 (1969). By submitting to the Commission's requirement, Exxon was forced to relinquish a possible defense

to reparations[5] and to relieve the shippers of the burden of proof which they would otherwise have in a reparation proceeding. *See* 49 C.F.R. § 1100.100. If Exxon had simply complied with the requirement without protest, it is not at all clear that it could have challenged the validity of the refund condition at some later time. As in the leading case of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152 (1967), immediate review is appropriate because the agency action has a direct, immediate effect, and places the aggrieved party in a dilemma in which it must comply or suffer unfavorable consequences.

D. Conclusion

In our petition for certiorari, we have pointed out the importance of the issue presented by this case. The Fifth Circuit allowed the Commission to engage in ratemaking without a hearing under the pretext of exercising its suspension power, in total disregard of this Court's holding in *ICC* v. *Cincinnati, N.O. & T.P. Ry.*, 167 U.S. 479 (1897), that the ratemaking power is never to be extended by implication. The Fifth Circuit also based its far-reaching decision upon a perverse misreading of this Court's opinion in the *Chessie* case. As a result of the Fifth Circuit's decision and the conflicting decision of the

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[5] Reparations are not automatically available as of right when a rate is found prospectively unreasonable. In *Arlington Heights Fruit Exch.* v. *Southern Pacific Co.*, 39 I.C.C. 88, 93 (1916), for instance, the Commission denied reparations because it "was considering a novel service only recently introduced, whose efficiency and permanence were in some degree problematical." The Commission commented that:

> "Under such circumstances the question of fixing a reasonable rate is attended with no little uncertainty, and the immediate establishment of an appropriate and reasonable charge for the new service is possibly requiring more of the carriers than in fairness could be exacted." *Ibid.*

We believe that such a defense may be available if a shipper sought reparations from Exxon.

D. C. Circuit in *Moss*, the present state of the law is confused concerning the existence of restraints on abuse of the suspension power. Moreover, the court's decision below invites further disregard by administrative agencies of the statutory and Constitutional limitations on their power. Only this Court can resolve the present uncertainty on these important issues of administrative law created by the Fifth Circuit's decision.

Petitioner respectfully requests that its petition for certiorari in this important case be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard J. Flynn, counsel for petitioner Exxon Pipeline Company and a member of the bar of this Court, hereby certify that, pursuant to Rule 33, copies of Exxon Pipeline Company's Reply to the Briefs in Opposition of the Respondents have been served upon all parties to the proceeding below and upon the additional parties listed below via first class mail, postage prepaid by depositing the same in the United States Postal Service at Washington, D. C., this 10th day of November, 1977:

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see

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